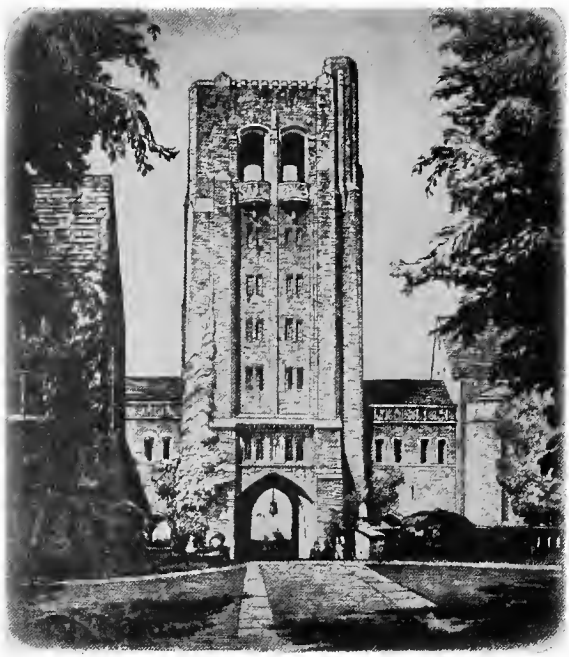

REMOVAL OF CAUSES

FROM THE STATE TO FEDERAL COURTS,

AN ANALYSIS OF THE LAW

AS CHANGED BY ACT OF CONGRESS OF MARCH 3, 1887.

WITH FORMS

ADAPTED TO THE LAW AS NOW OF FORCE,

AND

A TABULAR COMPENDIUM

SHOWING THE ESSENTIALS OF JURISDICTION BY REMOVAL.

BY EMORY SPEER,

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INTRODUCTION.

THE enactment of the sweeping changes in the jurisdiction of the national courts by the Act of Congress of March 3, 1887, is deemed a justification of this unpretentious work, the result of some experience and much consideration of the new statute. The law to be construed, in the language of an eminent judge, "is not remarkable for its perspicuity." Nor is this deficiency to be wondered at when we call to mind what seems to be a settled disposition, upon the part of our national law-makers, to reserve for the feverish wrangle of the last hours of the Congress, disputes relative to fundamental judicial powers, in their consequences pregnant and vital to the welfare of the country, the usefulness of its courts, and the permanency of its jurisprudence. To those who are familiar with the methods of our American parliament in the clos-

ing hours of the session, no enlargement of this suggestion is needed.

Those who have read the clear and strong opinions of the illustrious judicial tribunal whose important and continuous duty it has been to bring order out of the chaos of jurisdictional legislation, of the ominous dates March 2 and March 3, will agree that careful and deliberate thought, precise and lucid phrase, consistent and simple method, in legislation of this class, are most imperatively demanded by the necessities of the country.

The inadvertences deferentially indicated are most embarrassing to the administration of justice. This very recently has been made evident in the construction of this important statute, by the hesitating opinions and the conflicting decisions of circumspect and erudite judges.

Hereafter it is safe to say that every thoughtful lawyer and judge, ay, and layman, will join in the earnest hope that Congress will consider, and enact changes in the jurisdiction of the courts, only at a period of the session sufficiently remote from the 4th of March to consist with the judicial equipoise, the critical and scholarly acumen, of the great lawyers of that body.

In the preparation of the Forms, and the simple yet useful table in the Appendix, the author is greatly indebted to the skill and experience of MARION ERWIN, Esq., the Clerk of the District Court for the Southern District of Georgia.

SAVANNAH, Ga.,
January 23, 1888.

REMOVAL OF CAUSES

FROM THE

STATE TO THE FEDERAL COURTS.

CHAPTER I.

STATUTES EXPRESSLY REPEALED, AND THE CONTRARY.

§ 1. **Hasty and Ambiguous Legislation.** — The radical and comprehensive alterations in the jurisdiction of the Federal courts effected by the Act of Congress of March 3, 1887, will render a brief treatise thereon of immediate usefulness. The subject is of great and urgent importance. The legislation conferring jurisdiction upon the National courts, or limiting or withdrawing jurisdiction already conferred, should be as plain and as intelligible as the organic law itself. It is lamentably true, however, that it is obscure and ambiguous; that the unjustifiable practice of changing laws so momentous as these, in the turmoil, impatience, partisanship, and confusion incident to the closing hours of a Congressional term, is for

every reason deplorable. It has produced much litigation under the Acts of March 2, 1867, and March 3, 1875, while the Act of March 3, 1887, has left the jurisdictional statutes, upon which the gravest consequences depend, in a state of apparent doubtfulness which will necessitate more time for comparison and study than is usually available to the counsellor or attorney, in full practice, or the nisi prius judge in term.

It is purposed in this brief summary of the statutes, and the decisions construing them, to develop as clearly as may be the operative provisions of the law, now of force, as it affects the removal of causes from the State to the Federal courts.

§ 2. **Purpose of the Act of March 3, 1887.** — The Act of Congress of March 3, 1887, is an amendment to the Act of March 3, 1875. Its purpose is to determine the jurisdiction of Circuit Courts of the United States, to regulate the removal of causes from the State courts to the Federal courts, and to further regulate the jurisdiction of the latter courts. For convenient reference, there will be found in the Appendix a comparison of the text of the amended and the amending Acts.[1]

§ 3. **Statutes not Repealed.** — By the express terms of the amending Act, section 5, it is declared not

[1] See Appendix A.

to affect any jurisdiction or right mentioned in the several sections 641, 642, 643, 722, or in Title XXIV. of the Revised Statutes, section 8 of the Act of March 3, 1875, or the Act of March 1, 1875.[1]

§ 4. **Section 641. Denial of Civil Rights.** — Section 641 of the Revised Statutes by its first clause confers upon any person against whom a civil or criminal cause is pending in a State court, the right to remove the same, when by a State law, ordinance, regulation, or custom he is denied, or is unable to enforce, his civil rights as a citizen in the judicial tribunals of the State, or in that part of the State where the proceedings are pending.

This clause has reference to impediments and disabilities imposed upon the citizen by State action. It has no reference to the denial of civil rights, by the infringements of private prejudice, or by the action of individuals.

It has been held that a State statute which denies to colored citizens, otherwise qualified, because of their color, the right to serve as jurors, was an infringement of this character, and that section 641 is not in conflict with the Constitution of the United States.[2]

When, however, such a State statute has been

[1] Section 5, Act of March 3, 1887, Appendix, p. 100.

[2] Strouder *v.* West Virginia, 100 U. S. 303.

declared unconstitutional by the highest appellate tribunal of the State, it will be presumed, after the decision is rendered, that there is no denial of equal civil rights; but otherwise before the decision.[1]

§ 5. Sections 1 and 2 of the Act of March 1, 1875, known as the Civil Rights Act, have been declared unconstitutional.[2] These sections were intended to give to all, without regard to color, equal privileges of inns, public conveyances, and places of public amusement.

§ 6. Section 641 also provides that any officer of the United States, civil or military, or other person, may remove a proceeding against him for any alleged wrong committed under authority, or color of authority derived from any law, providing for equal civil rights, also a proceeding against him, for refusing to act, on the ground that the Act would be inconsistent with such law.

§ 7. Defendants in State courts seeking the benefit of this section must present a petition to the State court "at any time before the trial or final hearing" of the cause stating the facts, verified by oath, and praying that the proceeding be removed for trial to the next Circuit Court to be held in the Federal Judicial District where it is

[1] Bush *v.* Kentucky, 107 U. S. 110.
[2] Civil Rights Cases, 109 U. S. 3.

pending. On the instant such petition is filed, the State courts are inhibited from further action.

§ 8. The writ of *habeas corpus cum causa* is provided for by section 642 of the Revised Statutes when a defendant petitioning for removal is in actual custody on process issued by the State court. While the language of the section is, "that it shall be the duty of the clerk of the Circuit Court to issue the writ," it has been held that the judge must order the writ before it can issue.[1] When issued by the Circuit Court, it will be the duty of the State court and its officers to yield obedience to the writ, and it will be presumed that they will do so without any further inhibition, either by writ or otherwise.[2]

§ 9. **Proceedings against Officers of the Revenue, etc.**— The power of officers acting under the authority of the revenue laws to remove any civil or criminal prosecutions commenced against them, or against persons acting under them, on account of action had under color of their offices, or under color of the revenue laws, is preserved intact by section 643 of the Revised Statutes.

This power applies to proceedings against one to recover property held by title derived from the official action of such officer, and which ques-

[1] *Ex parte* Wills, 3 Woods, 128. (Decision by Mr. Justice Bradley.)

[2] Ibid.

tions the validity of a revenue law. It applies also to a proceeding against an officer, or other person, on account of an act done under the provisions of Title XXVI., "Elective Franchise," or on account of a right, title, or authority claimed by such officer, or other person, under any of the provisions of that title.

The suit or prosecution may be removed, at any time before trial or final hearing,[1] to the Circuit Court to be held in the District where the suit is pending. The petition for removal under this section must set forth the nature of the case, be verified by affidavit,[2] and must be presented together with a certificate of an attorney or counsellor at law, of the State or United States courts, stating that as counsel for the petitioner he has carefully inquired into the proceedings and the recitals of the petition, and that he believes the recitals to be true. The cause must then proceed as if originally commenced in the Circuit Court.

When the suit is commenced in the State court by process other than capias, the clerk of the Circuit Court shall issue a writ of certiorari requiring the State court to send up the record.

When it is commenced by capias, a *habeas corpus cum causa* is the appropriate writ.

[1] See *post*, §§ 17–32, and notes.

[2] That petition is not verified, may be waived by delaying objection. Pacific R. R. Cases, 115 U. S. 2.

When a duplicate of the suitable writ is delivered at the office of the clerk of the State court, or served upon him by a person duly authorized to make service, it becomes the duty of that tribunal to stay all proceedings. These are now presumed to be removed to the Circuit Court, and any further proceeding in the State court is void.[1]

If the petitioner has been arrested, the marshal must take him into custody, and if a copy of the record and proceedings in the State court is not obtainable the Circuit Court may allow, or require, the plaintiff to proceed therein *de novo*, as if the cause had been originally brought in the Circuit Court. On failure of the plaintiff so to proceed, the Circuit Court may render judgment against him, with costs for the defendant.

§ 10. **Provision Constitutional and Essential.**—The section just defined is declared to be not only constitutional, but essential to the power of the Government and to the protection due its officials.[2] It applies to marshals, their deputies and assistants, engaged in enforcing the law. It applies as well to the internal revenue as to post-office, customs, and other revenue laws of the United States.[3]

[1] Fisk *v.* Union Pac. R. R., 6 Blatchf. 362.

[2] Tennessee *v.* Davis, 100 U. S. 257; Finley *v.* Satterfield, 3 Woods, 504; Davis *v.* South Carolina, 107 U. S. 597.

[3] This statute was a codification of the Act of March 2, 1833 (4 Stat. at Large, 633), in which the language used was "the

This section was not superseded by the Act of March 3, 1875,[1] and it comprehends the entire subject of the conduct, freedom, and integrity of elections.

The power of the Federal courts under Title XXVI. over Federal elections, and all transactions affecting their integrity or freedom before or at the election and after it, may be considered as absolutely settled.[2] This power

revenue" laws of the United States. Under the original act it was held not to apply to cases arising under the internal revenue laws. Peyton *v.* Bliss, 1 Woolw. 170; Stevens *v.* Mack, 5 Blatchf. 514; Warner *v.* Fowler, 4 Blatchf. 311. In the revision of the laws the language was changed to "any revenue" law of the United States, which of course includes the internal revenue laws. A suit in a State court against a collector of customs, where the allegation is that he delivered to the consignee imported goods upon which there was a lien for freight, on receipt of the freight charges, without notifying the carrier as required by the Act of June 10, 1880, Par. 10 (21 Stat. at Large, 175), and to recover the money so received, is removable under this section, although the collector may allege in his defence that the act charged was not done. Railroad Co. *v.* McClung, 119 U. S. 454; City of Philadelphia *v.* Collector, 5 Wall. 720. See also Mustin et al. *v.* Cadwalader, Collector, 123 U. S. (decided Nov. 21, 1887). An action of slander against a revenue officer, for words spoken while in discharge of his official duty and explanatory of it, may be removed. Buttner *v.* Miller, 1 Woods C. C. 620.

[1] Venable *v.* Richards, 105 U. S. 636.

[2] *Ex parte* Yarbrough, 110 U. S. 651. This important case was conducted for the Government by the author, then United States District Attorney for the Northern District of Georgia. The prisoners were convicted for beating colored voters six months *after* the election, for their votes thereat. The conviction was affirmed by a unanimous bench, and the principle finally established, that, while there is no express power in the Constitution for the punishment of open violence, or insidious corruption, what is implied is as

is held to extend to violations of law in State elections, at which Representatives in Congress or Electors are voted for; and it does not matter that the violation related to the State official voted for, and failed to affect the Federal candidates.[1]

§ 11. Section 722 of the Revised Statutes, relating to the jurisdiction in civil and criminal matters for the protection of all persons in the United States in their civil rights, is expressly exempted from the operation of the Act of March 3, 1887.

This is true also of Title XXIV. of the Revised Statutes. It comprehends the same general subject.

§ 12. **Expressly Repealed.** — Section 640 of the Revised Statutes conferred upon a corporation organized under a law of the United States, and upon its members as such, the right to remove to the Circuit Court a suit commenced against it, or against them corporately, in a State court. This section was held not to be repealed by the Act of March 3, 1875,[2] but it is expressly repealed by the Act of March 3, 1887.

§ 13. When an alien brings in a State court

much a part of the instrument as what is expressed, and that the Government has the power at all times to protect the elections on which its existence depends. See also United States *v.* Waddell, 112 U. S. 77; Baldwin *v.* Francks, 120 U. S. 690.

[1] *In re* Coy, 31 Fed. Rep. 794, decision by Circuit Justice Harlan.

[2] Kain *v.* Texas Pac. R. R. Co., 3 Cent. L. J. 12; Ely *v.* No. Pac. R. R. Co., 36 Leg. Int. 164.

a personal action against a citizen of another State, who is also a civil officer of the United States, and who is personally served in the jurisdiction in which he is found, the suit may be removed into the Circuit Court of the United States in the District in which the defendant is served.[1]

Suits under this section are of rare occurrence. It will be seen, however, that its efficiency is unimpaired by the Act under discussion.

§ 14. Section 8 of the Act of March 3, 1875, is likewise in the amending Act specified as exempt from the scope of its repealing clause. That section relates simply to the service by publication of original process on non-resident defendants, where there is a suit commenced in a Circuit Court of the United States to enforce a legal or equitable lien or claim upon real or personal property in the District; or to remove encumbrance or lien or cloud upon the title thereof. It has no reference to the subject of removals.

§ 15. Section 8 of the Act of March 3, 1875,[2] is not specifically mentioned in the Act of March 3, 1887. It provides that, in an action

[1] Section 644, Rev. Stat.

[2] 18 Stat. at Large, 401. Supplement Rev. Stat., p. 165, should not be confounded with section 8 of Act of March 3, 1875, 18 Stat. at Large, 470. There are two sections with the same number, and two Acts of the same date.

brought against an officer of either house of Congress, the district attorney shall on request appear for such officer. It provides further for the removal of the suit, and gives the officer of Congress the benefits accorded to the defendant in suits against revenue and other officers of the United States, and directs that the defence of the action shall be conducted under the supervision and direction of the Attorney-General. This provision was a rider to an appropriation bill, and is in effect supplemental to Section 643 of the Revised Statutes, extending the protection granted by that section to officers of Congress. It is neither expressly repealed nor expressly exempted from the repealing effect of the Act of 1887, but it is not in conflict with that Act, nor are the cases provided for by it provided for by the latter Act. It is therefore still of force.[1]

[1] B. & O. R. R. *v.* Bates, 119 U. S. 464; Venable *v.* Richards, 105 U. S. 636.

CHAPTER II.

CONTROLLING STATUTES ON THE SUBJECT OF REMOVAL.

§ 16. These are the Acts of 1789, 1866, 1867, 1875, and 1887.

The Act of 1789, known as the Judiciary Act, as embodied in sub-section "First" of section 639 of the Revised Statutes, was repealed by the Act of 1875. The Act of 1866, embodied in sub-section "Second" of section 639, was repealed by the same act.[1]

Sub-section "Third" (Act of March 2, 1867) was not repealed by the Act of 1875.[2] It will be observed that there was much contrariety of opinion upon the extent of the repealing effect of the Act of 1875. It was definitively held, however that the first sub-section of section 639 of the Revised Statutes was superseded.[3]

[1] Railroad Co. *v.* Bates, 119 U. S. 464; King *v.* Cornell, 106 U. S. 395; Hyde *v.* Ruble, 104 U. S. 407.

[2] Railroad Co. *v.* Bates, *supra;* Hess *v.* Reynolds, 113 U. S. 73; Pullman Co. *v.* Specks, 113 U. S. 84; Bible Society *v.* Grove, 101 U. S. 610.

[3] Mfg. Co. *v.* Tube Works, 15 Blatchf. 432; Girardy *v.* Moore, 3 Woods, 97.

But the authority was very respectable to warrant the conclusion that sub-section second was not repealed.[1]

[1] Girardy *v.* Moore, *supra;* Wormser *v.* Dahlman, 16 Blatchf. 319; McLean *v.* R. R. Co., 16 Blatchf. 319; Hyde *v.* Ruble, 3 Morr. Trans. 516; and many others.

CHAPTER III.

LOCAL PREJUDICE ACT OF 1867.

§ 17. **Analysis of Act of March 2, 1867.** — The precise language of this act as embodied in the Revised Statutes will be found in the appended note.[1]

[1] Section 639, Revised Statutes. "Any suit commenced in any State court, wherein the amount in dispute, exclusive of costs, exceeds the sum or value of five hundred dollars, to be made to appear to the satisfaction of said court, may be removed for trial into the Circuit Court for the District where such suit is pending next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section. . . . .

"Third, When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if before or at the time of filing said petition he makes and files in said State court an affidavit stating that he has reason to believe, and does believe, that, from prejudice or local influence, he will not be able to obtain justice in such State court. . . . .

"In order to such removal, the petitioner in the cases aforesaid must, at the time of filing his petition therefor, offer in said State court good and sufficient surety for his entering in such Circuit Court, on the first day of its session, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the cause, or, in said cases where a citizen of the State in which the suit is brought is a defendant, copies of all process, pleadings, depositions, testimony, and other proceedings in the cause concerning or affecting the petitioner, and also for his there appearing and entering special bail in the cause, if special bail was

Its analysis, as given by Mr. Justice Miller in Johnson *v.* Monell,[1] declares that the conditions necessary to the right of removal under it are: —

1st. That the controversy shall be between a citizen of the State in which it is brought and a citizen of another State.

2d. That the matter in dispute shall exceed the sum or value of $500, exclusive of costs.

3d. That the party citizen of such other State shall file the required affidavit stating the local prejudice.

4th. Giving the requisite surety for appearing in the Federal court.

This is also adopted by Judge Dillon.[2]

It is true, however, that there are at times other features essential to the removal, not here enumerated. These have been from time to time alluded to by the great tribunal of which Mr. Justice Miller is so distinguished a member.

originally requisite therein. It shall, thereupon, be the duty of the State court to accept the surety, and to proceed no further in the cause against the petitioner, and any bail that may have been originally taken shall be discharged. When the said copies are entered as aforesaid in the Circuit Court, the cause shall there proceed in the same manner as if it had been brought there by original process, and the copies of pleadings shall have the same force and effect, in every respect and for every purpose, as the original pleadings would have had by the laws and practice of the courts of such State, if the cause had remained in the State court."

[1] Johnson *v.* Monell, 1 Woolw. 390.

[2] Dillon on Removal of Causes, 4th ed., p. 19.

1st. Where there are several plaintiffs or several defendants, all the parties on one side must be citizens of the State where suit is brought, and all on the other must be citizens of another State or other States. And the proper citizenship must exist both when the action is commenced and when the petition for removal is filed.[1]

2d. The whole suit must be removed.[1]

3d. All necessary parties on the side seeking removal must unite, and there can be no removal if one of the parties has lost his right.[2]

4th. The right involved in the suit must be capable of being valued in money.

This last important essential is made plainly to appear in Kurtz *v.* Moffit.[3] That was a petition to remove a proceeding for habeas corpus under the Act of March 3, 1875. The cause was remanded, and, after a careful review of the au-

[1] Sewing Machine Cases, 18 Wall. 553; Bible Society *v.* Grove, 101 U. S. 610; Barney *v.* Latham, 103 U. S. 210; Myers *v.* Swann, 107 U. S. 546; Jefferson *v.* Driver, 117 U. S. 272; Cambria Iron Co. *v.* Ashburn, 118 U. S. 54; Hancock *v.* Holbrook, 119 U. S. 586; Gibson *v.* Bruce, 108 U. S. 561; Akers *v.* Akers, 117 U. S. 197.

[2] Bixby *v.* Couse, 8 Blatchf. 73; Fletcher *v.* Hamlet, 116 U. S. 408. As to who are nominal parties see Knapp *v.* Troy & Boston R. R. Co., 20 Wall. 117; Brown *v.* Strode, 5 Cranch, 303; Wormley *v.* Wormley, 8 Wheaton, 421; McNutt *v.* Bland, 2 How. 1; Coal Co. *v.* Blatchford, 11 Wall. 172; Arapahoe *v.* Kansas, &c. R. Co., 4 Dill. 277; Hervey *v.* Ill. Mid. R. R. Co., 7 Biss. 103; Wood *v.* Davis, 18 How. 467; Union Bank *v.* Stafford, 12 How. 467. See also *post* § 20, note, § 28, § 31.

[3] Kurtz *v.* Moffit, 115 U. S. 498.

thorities, Mr. Justice Gray for the court, with his usual clearness, announces this proposition: "From this review of the statutes and decisions the conclusion is inevitable that a jurisdiction conferred by Congress upon any court of the United States of suits at law or in equity of which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money."

Under this Act, the cause was removable at any time before the trial or final hearing.[1]

[1] May be removed after a cause has been tried in a State court, and a new trial granted, but not while a motion for a new trial is pending. Ins. Co. *v.* Dunn, 19 Wall. 214; Vannevar *v.* Bryant, 21 Wall. 41.

That part of the section which relates to citizenship, and defines the cases in which causes may be removed, being fundamental and based on the grant of judicial power, its conditions are indispensable, cannot be waived, and must be shown by the record. Ayres *v.* Watson, 113 U. S. 594. That portion of the section relating to the manner of removal not being jurisdictional, but a mere rule of limitation, its requirements may be waived. Ayres *v.* Watson, 113 U. S. 594; Railroad Co. *v.* Hart, 114 U. S. 654. That a petition is not verified by oath, or is filed too late, may be waived by delaying objection. Texas & Pacific Ry. *v.* Kirk, 115 U. S. 2. Who may sign the petition and make the affidavit of prejudice? The authorities differ on this question. The petition and affidavit may be signed by an attorney in fact for the petitioner; Dennis *v.* Alachua Co., 3 Woods, 683 (decision by Judge Settle); or by the attorney of record. Hart *v.* New Orleans, 14 Fed. Rep. 180. An application for removal under this section may be made by a corporation of another State, through its authorized agent or attorney. Mix *v.* Andes Ins. Co., 74 N. Y. 53; Shaft *v.* Phœnix Ins. Co., 67 N. Y. 544. It would seem that the president or other principal officer of

The degree of proof that will justify a removal on the ground of local prejudice will be discussed in a subsequent chapter.[1]

§ 18. The importance of the right to remove upon the ground of local prejudice is very great, and, while Congress has the power wholly to withdraw the right, the courts have been very careful to protect its effectiveness where the intention to repeal it did not clearly appear.

In Hess *v.* Reynolds, 113 U. S. 73, Mr. Justice Miller, for the court, in discussing this section, said: "The language of the repealing clause of the Act of 1875 is, 'That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.' This implies very strongly that there may be acts on the same subject which

a corporation may make the affidavit. Minnett *v.* Railway Co., 3 Dillon, 460; Insurance Co. *v.* Dunn, 19 Wall. 214. But not the superintendent of a railroad company, where the representation of the company in judicial proceedings is not within the scope of his official duties. Mahone *v.* Manchester, &c. R. R., 111 Mass. 72. The affidavit as to prejudice and local influence to a petition for removal by a natural person, must be made by the party in person. A removal cannot be had upon an affidavit made by his attorney, agent, or any other person on his behalf. Duff et al. *v.* Duff, 31 Fed. Rep. 772 (decision by Judge Sawyer, Aug. 1, 1887). See also Mahone *v.* Manchester, &c. R. R., *supra*, in which Justice Gray, now of the Supreme Court of the United States, delivered the opinion of the court.

If the affidavit is made in another State, it must be so attested as to make it admissible under the laws of the State where the suit is pending. Bowen *v.* Chase, 7 Blatchf. 255.

[1] See *post*, § 42.

are not repealed. . . . . We do not think this provision is embraced in the Act of 1875, which says nothing about prejudice or local influence, and is not in conflict with that Act. We are of opinion that this clause of section 639 remains and is complete in itself, furnishing its own peculiar cause of removal, and prescribing, for reasons appropriate to it, the time within which it must be done. One of these reasons is, that the prejudice may not exist at the beginning, or the hostile influence may not become known or developed at an earlier stage of the proceeding. Congress therefore intended to provide against this local hostility whenever it existed up to the time of trial."[1] The consideration of this Act has been thought essential to the clear development of the superseding clause referred to in the next chapter.

[1] Sub-section 3 of section 639 was held to remain in force, because the cases therein provided for were not included among those mentioned in the Act of 1875. Railroad Co. *v.* Bates, 119 U. S. 464.

CHAPTER IV.

ACT OF MARCH 3, 1887.[1]

§ 19. **The Amending Enactment.**—This enactment provides in several clauses for the right of removal. Adopting the method of the Supreme Court of the United States in the Removal Causes,[2] we will consider them seriatim.

§ 20. **The first clause[3] of Section 2** gives the right to remove, in suits of a civil nature at law or in equity, arising under the Constitution or laws of the United States, or treaties made under their authority, of which the Circuit Courts are given original jurisdiction concurrent with the courts of the several States by the preceding section. This right of removal is in terms re-

[1] 24 Stat. at Large, 552.

[2] Removal Causes, 100 U. S. 457. See also Barney *v.* Latham, 103 U. S. 205.

[3] Clause 1: "That any suit of a civil nature at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the Circuit Court of the United States for the proper District."

stricted to the defendant or defendants. By the "preceding section" original jurisdiction is given in such suits where the amount exclusive of interest and costs exceeds the sum or value of two thousand dollars. It follows, then, that where the jurisdiction inheres in the United States courts, concurrent with the State courts, because the controversy involves a Federal question, the suit can be removed by the defendant only, and then only when the amount involved exclusive of interest and costs exceeds the sum or value of two thousand dollars. This right of course applies to all defendants, independently of the citizenship of the parties.

It appears, therefore, that the United States, where a Federal question is involved, if plaintiff in a State court, is denied by this enactment the power to remove its cause to the Federal court. The Government may sue, however, in the State or Federal court, for a sum less than two thousand dollars; and the Government doubtless could remove its causes, even in the absence of express legislation permitting the removal.[1]

[1] It has been held that an Act of Congress was not necessary to enable the United States to sue; that they have an inherent right. U. S. *v.* Baker, 1 Paine, 156.

Federal question. — "A case in law or equity consists of the right of one party as well as the other, and may be truly said to arise under the Constitution, or a law of the United States, whenever its correct decision depends upon a right construction of either." Iowa *v.* R. R. Co., 33 Fed. Rep. 391; Cohens *v.* Virginia, 6 Wheat.

This clause contemplates the removal of the whole suit,[1] and it is essential that all the necessary parties shall unite in the exercise of the right of removal.[2]

379; The Mayor *v.* Cooper, 6 Wall. 252. "A cause cannot be removed from a State court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. The decision of the case must depend upon that construction." Gold-Washing, &c. Co. *v.* Keyes, 96 U. S. 203. "It is no objection, that questions are involved which are not all of a Federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction." Cohens *v.* Virginia, 6 Wheat. 379. As to State laws impairing the obligation of contracts, see Smith *v.* Greenhow, 109 U. S. 669; People *v.* Illinois, &c. R. R., 16 Fed. Rep. 881; Coast Line R. R. *v.* Mayor, &c. of Savannah, 30 Fed. Rep. 646; Miller *v.* State, 15 Wall. 478; Com. *v.* Essex Co., 13 Gray, 239; Holyoke Co. *v.* Lyman, 15 Wall. 700; Chicago *v.* Sheldon, 9 Wall. 50; Railroad Co. *v.* Maine, 96 U. S. 499. Corporations created by and organized under Acts of Congress are entitled to remove suits brought against them in the State courts, on the ground that such suits are suits arising under the laws of the United States. Texas & Pacific Ry. *v.* Kirk, 115 U. S. 2. But this does not apply to national banking associations established under the laws of the United States. Section 4 of Act of 1887. (See Appendix A.)

[1] Removal Cases, 100 U. S. 457; Barney *v.* Latham, 103 U. S. 205.

[2] Bixby *v.* Couse, 8 Blatchf. 73. And, where one of the parties loses the right by failure to exercise it in time, there can be no removal. Fletcher *v.* Hamlet, 116 U. S. 408. As to who are necessary parties, see *ante*, § 17, note, and *post*, § 28, § 30. Where a forthcoming bond is made payable to a United States marshal, and he brings suit upon it in a State court for use of a citizen of another State against citizens of the State, the marshal is merely a formal party and the suit may be removed, and the marshal would have been entitled to bring suit in the Circuit Court in the first instance, by virtue of his office. Wade, Marshal, for use, &c. *v.* Wortsman, 29 Fed. Rep. 754.

§ 21. **The Second Clause**[1] **of Section 2** gives the right to remove all other suits of a civil nature, at law or in equity, of which the Circuit Courts are given jurisdiction by the "preceding section." This includes, —

1st. Suits where there is a controversy in which the United States are plaintiffs or petitioners, without regard to amount.

2d. Suits in which there is a controversy between citizens of the same State claiming lands under grants of different States.[2]

[1] Clause 2: "Any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the Circuit Court of the United States for the proper District by the defendant or defendants therein being non-residents of that State."

[2] Although the context of section 1 would seem to indicate that this class of cases is removable without regard to amount, perhaps an intention to limit the right to suits involving the sum or value of $2,000, exclusive of interest and costs, may be inferred from the last clause of section 3 of the Act of 1875 as amended by the Act of 1887. That this clause relates simply to the manner of ascertaining whether the suit is one removable under clause 2 of section 2 is evident. The last clause of section 3 reads as follows: "and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of $2,000, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right

3d. Suits where there is a controversy between citizens of a State and foreign States, or citizens or subjects of foreign States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.[1]

4th. Suits where there is a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.[1]

or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this Act, remove the cause for trial to the Circuit Court of the United States next to be holden in such District; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim."

[1] Aliens and citizens, who are? — Unnaturalized foreigners resident in a State are aliens. Baird *v.* Byrne, 3 Wall. Jr. 1. Indians are not aliens. Karraboo *v.* Adams, 1 Dill. 344. An Indian living among white citizens, not a citizen. Elk *v.* Wilkins, 112 U. S. 94. A person born in one of the States of the Union, who by reason thereof is, under section 1 of the 14th Amendment, a citizen of the United States, is under that section a citizen of the State where he resides. Bradwell *v.* Illinois, 16 Wall. 130. A State cannot convert an alien into a citizen by conferring the right of suffrage. Lanz *v.* Randall, 4 Dill. 425. An alien cannot remove a cause under the Act of 1875, because there is a controversy between him and a citizen of the United States, where the latter is not a citizen of a particular State. Deakin *v.* Lea, 13 Reporter, 772. Citizenship has reference to domicil and residence, and not merely to the right of suffrage. Shelton *v.* Tiffin, 6 How. 163; Cooper *v.* Galbraith, 3 Wash. 546; Case *v.* Clark, 5 Mason, 70. A change of residence

In all of these the right of removal is restricted to the non-resident defendant or defendants.[1]

§ 22. It will be observed that the jurisdiction conferred by this clause is limited to cases of which the Circuit Courts are given original jurisdiction by the first section of the Act.

This clause contemplates the removal of the whole suit;[2] all necessary parties defendant must

from one State to another, with intent to remain, works a change of citizenship. Jones *v.* League, 18 How. 76. The law presumes the domicil of origin to be retained until residence elsewhere has been shown; but proof of such residence repels the presumption, and casts on him who denies it the burden of proof. Ennis *v.* Smith, 14 How. 400. For full discussion of naturalization and redintegration, see Green's Sons & Co. *v.* Ramon Salas, 31 Fed. Rep. 106. A merchant going to a country in pursuit of business with intent to return will not lose his domicil thereby. The Friendschaft, 3 Wheat. 14. Where the jurisdiction is by the Constitution made to depend upon the party, the party in contemplation is the party of record. Osborn *v.* U. S. Bank, 9 Wheat. 738; U. S. Bank *v.* Planters' Bank, Id. 904; Gov. of Georgia *v.* Madrago, 1 Pet. 110. Corporations are conclusively presumed to be citizens and residents of the State creating them. National Steamship Co. *v.* Tugman, 106 U. S. 118; Ohio, &c. R. R. *v.* Wheeler, 1 Black, 286; *Ex parte* Schollenberger, 96 U. S. 369; Railroad Co. *v.* Harris, 12 Wall. 65; Railroad Co. *v.* Whitton, 13 Wall. 270. Corporations chartered under the laws of two States are citizens of both States, and cannot remove a suit because of a difference of citizenship when sued by a citizen of one of those States. Memphis & Charleston R. R. *v.* Alabama, 107 U. S. 581. Residents of Territories and the District of Columbia are not citizens of States. Cissel *v.* McDonald, 57 How. Pr. 175; see s. c. 16 Blatchf. 150; Darst *v.* Peoria, 14 Reporter. 772.

[1] Weller *v.* Pace Tobacco Co., 32 Fed. Rep. 860.

[2] Removal Cases, 100 U. S. 457; Barney *v.* Latham, 103 U. S. 205.

Construction.— Clauses 1 and 2 of section 2 of the Act of 1887

unite in the exercise of the right,[1] and all of the defendants must be non-residents of the State where suit is brought.

§ 23. In a recent decision by Judge Sawyer, in which Mr. Justice Field and Judge Sabin concurred, (Circuit Court of the Northern District of California, August 29, 1887,) it is held that, "Under section 1 of the Removal Act, as amended by the Act of March 3, 1887, the Circuit Court cannot take cognizance of a suit brought against a party in a District of which he is not an inhabitant; and section 2 of said Act, as amended, does not authorize the removal of a suit from a State court to the United States Circuit Court, which could not have been originally brought in said Circuit Court."[2] Therefore a suit brought under the common practice of the State courts, where non-residents are sued wherever they can be served, cannot under this decision be removed.

This decision and its sweeping results have been criticised by Judge Shiras in the case of Fales, Admx. *v.* Chicago, &c. Railway (32 Fed. Rep. 673), Circuit Court of Iowa, and, with

cover exactly the same cases (except in amount) provided for by clause 1 of section 2 of the Act of 1875. This clause was construed in the Removal Cases, 100 U. S. 457.

[1] Bixby *v.* Couse, 8 Blatchf. 73; Fletcher *v.* Hamlet, 116 U. S. 408; *ante*, § 17, note, § 20, note; *post*, § 28, § 30, note.

[2] County of Yuba *v.* Pioneer Mining Co., 32 Fed. Rep. 183.

much force of reasoning, a different conclusion is reached.[1]

So far as it relates to citizenship, the language of section 1 conferring jurisdiction is as follows: "That the Circuit Court shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, . . . in which there shall be a controversy between citizens of different States in which the matter in dispute exceeds the sum or value of $2,000," with the restriction that "no civil suit shall be brought . . . against any person by any *original process* or *proceeding* in any other District than that whereof he is an inhabitant." The provision of the old law allowing him to be sued "in a District in which he shall be found at the time of serving such process or commencing such proceeding," is repealed by the Act of 1887.[2] This novel restriction is added: "*but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the District of the residence of either the plaintiff or the defendant.*"

[1] The view of Judge Shiras has been adopted by Circuit Judge Brewer in Short *v.* R. R. Co., 33 Fed. Rep. 115. See also decision of Judge Hammond of the Western District of Tennessee in Gavin *v.* Vance, 33 Fed. Rep. 84. See also *post*, § 31, note.

[2] The language "except as hereinafter provided," contained in section 1 of the Act of 1875, refers to local actions brought by publication of original process, to enforce liens, remove cloud upon title, etc., as provided for in section 8 of the same Act.

In construing the portion of this section contained in the Act of 1875, Judge Wallace, in Kelsey *v.* Penn. R. R. Co. (14 Blatchf. 89), said: "The defendant having appeared and answered generally in the action cannot now insist that this court never acquired jurisdiction because process was not served upon it in the District whereof it was an inhabitant at the time of service. Jurisdiction of the person of a defendant may be conferred by consent or waiver. Jurisdiction of the subject matter of the action cannot."[1]

In construing the same language, the Supreme Court of the United States, in *Ex parte* Schollenberger (96 U. S. 369), Chief Justice Waite delivering the opinion of the court, declares: "The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases." Again: "A corporation cannot change its residence or its citizenship. It can

[1] Construing the same language in the Judiciary Act, it was held that, where a defendant not an inhabitant of or found within the District was sued in a State court, the fact that he appeared and gave bond to remove the cause into the Circuit Court was a waiver of his personal privilege and gave the Circuit Court jurisdiction. Sales *v.* Ins. Co., 2 Curtis C. C. 212.

have its legal home only at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter or excluded by local laws. . . . If the legislature of a State requires a foreign corporation to consent to be 'found' within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, the fact that it is found gives the jurisdiction." Again: "It is unnecessary to inquire whether these several companies were inhabitants of the District. The requirements of the law for all the purposes of this case are satisfied if they were found there at the time of the commencement of the suits."

The amendment denying the original process against a non-resident in the District in which he shall be found, etc., will make it advantageous to consider upon authority when a foreign corporation can be an inhabitant of a District outside of the State of its creation.[1]

§ 24. The decision above quoted[2] points to the distinction between a "citizen," a "resident," and an "inhabitant," within the meaning of the statute.

[1] See St. Louis Wire Co. *v.* Consolidated Wire Co., 32 Fed. Rep. 801; U. S. *v.* Telephone Co., 29 Fed. Rep. 37.

[2] *Ex parte* Schollenberger, *supra.*

A change of *residence* from one State to another with *intent to remain* works a change of *citizenship* sufficient for the purposes of jurisdiction.[1] Residence is not synonymous with citizenship.[2]

One may have several places of abode, but the statute contemplates but one residence, and that the legal residence This is plainly implied in the language of the Supreme Court above quoted. Thus one may personally carry on a daily business in one State, and have his legal residence in another State.[3]

Lord Mansfield's definition of an "inhabitant" is an "actual resident." Thus it would seem that a man might be a citizen of Pennsylvania, a resident of New Jersey, and an inhabitant both of New Jersey and New York if he carried on a daily business in the latter State. A corporation, while it can only be a citizen and have its legal residence in the State which creates it, may through its agents become an inhabitant of several States, so that it may be sued.

§ 25. The suits which can be maintained by original process under section 1 because of citizenship may be illustrated as follows: —

[1] Jones *v.* League, 18 How. 76.

[2] Brock *v.* Doyle, 18 Fla. 172 ; Kelly *v.* Houghton, 23 Fed. Rep. 417; Parker *v.* Overman, 18 How. 137.

[3] The Thomas Fletcher, decided by Judge Pardee, 24 Fed. Rep. 375.

1st. A citizen of Georgia having a legal residence in the Southern District of Georgia, and being an inhabitant of that District, can be sued in the United States court by a citizen of New York in the Southern District of Georgia only.[1]

2d. A citizen of Georgia having a legal residence in the Southern District of Georgia, but being an inhabitant of the Northern District of Florida, can be sued in the United States court by a citizen of New York in the Southern District of Georgia only.

3d. A citizen of Georgia having a legal residence in the Southern District of Georgia, but being also an inhabitant of the Southern District of New York although not a citizen there, can be sued by a citizen of New York residing in the Southern District of New York either in the Southern District of Georgia or in the Southern District of New York.

§ 26. Now the language of clause 2 of section 2 of the Act of 1887 confines the right of removal to the defendant or defendants who may be non-resident of the State where suit is brought, and limits the right to civil suits of which the Circuit Courts are given jurisdiction by section 1 of the Act.

If, therefore, the provision restricting suits in

[1] But see decision of Judge Brewer in Short *v.* R. R. Co., 33 Fed. Rep. 115.

the United States courts except as against defendants who are inhabitants of the District where they are served, and the further provision that the suit can be brought only in the District of the residence of either the plaintiff or the defendant, are jurisdictional, then it is apparent that, if a defendant is sued in a State court by a non-resident plaintiff in any other case than the three cases which are pointed out as illustrating section 1, the cause cannot be removed, because it could not have been brought originally in the Circuit Court.

To recur to the illustration. If a citizen and resident of Georgia be sued in a State court of Georgia by a citizen of New York, the suit cannot be removed because the defendant is not a non-resident. If the Georgian is sued by the New Yorker in the State court of Florida, where he may be an inhabitant, but not a citizen, the suit cannot be removed if the restriction be jurisdictional because the defendant's legal residence is not in the District in which he is sued, and an original suit in the Federal court could not have been maintained.

The only case, then, in which a removal can be had, is where the citizen of Georgia having his legal "residence" in Georgia, and at the same time being an "inhabitant" of New York, is sued in a State court of New York by a citizen of that

State, a case which will occur so infrequently that it is of little consequence. This construction then is practically equivalent to abolishing altogether the right of removal on account of citizenship, and effectually destroys the usefulness of the National courts in the immense volume of litigation between the people of the several States. Could Congress have intendedthus completely to cripple these courts, and to deny non-residents sued in the State courts a trial in tribunals presumably free from all the disadvantages which environ a stranger in a strange place? It would seem impossible.[1]

To the argumentative force of the monstrous and revolutionary result of this construction, it may be added that it seems reasonable to conclude that the jurisdiction was conferred upon the Circuit Courts by the first part of section 1; that its exercise by *original* process only was limited by the latter portion of the section; and that the expression "cannot take cognizance" imports "cannot originally take cognizance." If this be true, it implies very strongly that the jurisdiction was not intended to be denied in suits brought before the court by proceedings other than original, as by removal from State courts. This is in harmony

[1] Judge Hammond, in the case of Gavin *v.* Vance, 33 Fed. Rep. 84, holds that a non-resident sued in a State court may remove. See *post*, § 31, note.

with the construction by the Supreme Court of the United States of the latter portion of this section, where, as we have seen, they hold that the provision "is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant."[1]

§ 27. The same limitation as to suits by "original process" is found in the Act of 1875, and was not held and could not have been held to apply to removed causes.[2] To make it so apply under the amending Act is to defeat the obvious purpose of the amendment. This was undeniably to prevent the hardship which was sometimes experienced when a non-resident was sued in a Circuit Court in a District where he was travelling or sojourning, and where it was expensive or difficult to defend his suit. But the amendment can have no effect to deter such suits in the State courts, where presumably the hardship will be equally great, if not more aggravated.

Notwithstanding the great weight as authority of the decision in County of Yuba *v.* Pioneer Mining Co., *supra*,[3] the safer and more obvious conclu-

[1] *Ante*, § 23, note.

[2] Suits commenced by attachment removable. Barney *v.* Globe Bank, 5 Blatchf. 107; Sayles *v.* N. W. Ins. Co., 2 Curtis, 212; Keith *v.* Levi, 2 Fed. Rep. 743.

[3] While this discussion is in press, the Circuit Court of the United States for the Northern District of California, in the case of Wilson

sion seems that the provision in clauses 1 and 2 of section 2 of the Act of 1887, limiting removals to suits of which the Circuit Courts are given jurisdiction by the preceding section, was intended to deny the right to remove suits to recover on promissory notes and choses in action in favor of an assignee, where the citizenship of the original parties to the contract was such as to prevent them from suing in the Circuit Court, and thus to meet a well-known line of decisions allowing such removal.[1]

§ 28. **The Third Clause[2] of Section 2** is in the precise language of the second clause of section 2

v. The Telegraph Co., Justice Field delivering the opinion, expressly overrules its decision in Yuba County against the Mining Co., *supra*. Decision rendered March 19, 1888, not yet reported.

[1] Claflin *v.* Ins. Co., 110 U. S. 81.

General Note. Right of assignee to sue. — In the case of Burnheim *v.* Birnbaum (decided in the Circuit Court, S. Dist. Georgia, April 23, 1887), it was held that the language, "unless such suit might have been prosecuted to recover said contents if no assignment or transfer had been made," can have no reference to the question of amount, but relates to the citizenship of the parties; and that an action may be maintained in the United States Circuit Courts where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, although it is made up of distinct demands of less value than $2,000, and although the plaintiff may have acquired such demands by assignment. 30 Fed. Rep. 885. See also Hammond *v.* Cleaveland, 23 Fed. Rep. 1.

[2] Clause 3: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper District."

of the Act of 1875, except that it restricts the right of removal to the defendant. That clause has been construed by the Supreme Court, and its rulings are therefore decisive now. When the court has placed a certain construction upon language, the use of the same language in a subsequent Act implies that Congress intends that which has been already determined as its meaning.[1]

In Barney *v.* Latham (103 U. S. 205), after stating that it was an amendment of the Act of 1866, Mr. Justice Harlan, for the court, said in reference to that Act: —

"This provision is explicit, and leaves no doubt what Congress intended to accomplish. It proceeds plainly upon the ground, among others, that a suit may, under correct pleading, embrace several controversies, one of which may be between the plaintiff and that defendant who is a citizen of a State other than that in which the suit is brought; that to the final determination of such separate controversy the other defendants may not be indispensable parties; that in such case, although one citizen of another State is co-defendant with one whose citizenship is the same as the plaintiff's, he should not, as to his separable controversy, be required to remain in the State

[1] Western Union Tel. Co. *v* Brown, 32 Fed. Rep. 340; Claflin *v.* Ins. Co., 110 U. S. 81.

court, and surrender his constitutional right to invoke the jurisdiction of the Federal court, but that, at his election, . . . the cause, so far as it concerns him, might be removed into the Federal court, leaving the plaintiff, if he so desires, to proceed in the State court against the other defendants."

Then, construing the second clause of the second section of the Act of 1875, he says: —

"Both Acts alike recognize the fact that a suit might, consistently with the rules of pleading, embrace several distinct controversies; but while the Act of 1866 in express terms authorizes the removal only of the separable controversy between the plaintiff and the defendant or defendants seeking such removal, leaving the remainder of the suit, at the election of the plaintiff, in the State court, the Act of 1875 provided in that class of cases for the removal of the entire suit."

In subsequent cases the Supreme Court, in construing this clause, say: —

"To entitle a party to removal under this clause, there must exist in the suit a separate and distinct cause of action, in respect to which all the necessary parties on one side are citizens of different States from those on the other."[1]

Again they say: "In no just sense can it be said that the pleadings present separate controversies,

[1] Hyde *v.* Ruble, 104 U. S. 407.

such as admit of separate and distinct trials. If they do not, there could be no removal under the second clause of the Act of March 3, 1875, any more than under the first."[1]

Again: "To entitle a party to a removal under the second clause of the second section of the Act, there must exist in the suit a separate and distinct cause of action, on which a separate and distinct suit might properly have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different States from those on the other. To say the least, the case must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side and citizens of other States on the other, which can be fully determined without the presence of any of the other parties to the suit as it has been begun."[2]

§ 29. Upon a consideration of these authorities Judge Brewer, in Western Union Telegraph Co. *v.* Brown,[3] declares: "It is impossible to avoid the conclusion that the Supreme Court has placed upon this second clause this construction: that

[1] Corbin *v.* Van Brunt, 105 U. S. 576.

[2] Fraser *v.* Jennison, 106 U. S. 191. See also Brooks *v.* Clark, 119 U. S. 502, where Barney *v.* Latham is expressly reaffirmed; Anderson *v.* Appleton, 32 Fed. Rep. 855 (decided in Circuit Court of New York, S. Dist., December, 1887).

[3] Western U. Tel. Co. *v.* Brown, 32 Fed. Rep. 337.

it applies solely to causes in which there are two or more controversies. And indeed this is but the natural and reasonable construction, for the first clause is broad enough and full enough to cover every case in which there is but a single controversy." The conclusion follows, that no case between citizens of different States where there is but a single controversy is removable under this clause.

§ 30. It is fairly doubtful whether this conclusion is warranted by the authorities. The Removal Cases (100 U. S. 457), omitting merely formal parties, presented but a single controversy in each cause, but it is said there by the Supreme Court: "Whether, as argued, a removal could also have been had under the last clause,[1] we do not decide." In each subsequent case, the Supreme Court had before it a record in which all the parties on the one side were not of different citizenship from all the parties on the other side, and which could not, therefore, be removed unless there could be carved out of the suit a single separable controversy in which the parties on each side were of different citizenship. Had there been but a single controversy wholly between citizens of different States, there would have been no room for interpretation, and in such cases there has been no dispute.

[1] The clause now under consideration.

It has been held that both clauses cover cases having several plaintiffs or defendants, and only a single controversy, and that a removable one.[1]

It seems that the language of clause 2 of the Act of 1875 is broad enough to allow suits containing but a single controversy to be removed under it, where the requisites of diverse citizenship exist. And because, under the peculiar verbiage of the Act of 1866, it was necessarily held that the suit must contain two or more controversies, because there were one or more of the plaintiffs living in the same State with the defendant, or *vice versa*, would be no good reason for holding the same thing under the broader terms of clause 2 of the Act of 1875, which was a substitute for the Act of 1866. On the contrary, the change in the language in the latter Act would indicate an intention to amend the law in that particular.

In the case of Anderson *v.* Appleton,[2] Judge Lacombe cites Telegraph Co. *v.* Brown, *supra*, but apparently declines to adopt it. Like all the other cases, the party defendant removing in Anderson *v.* Appleton was embarrassed by parties on the opposite side who lived in her State, and the eminent judge contents himself with holding that the controversy was not removable because not divisible. In the unanimous decision of Blake *v.*

[1] Mutual Life Ins. Co. *v.* Champlin, 21 Fed. Rep. 85.
[2] Anderson *v.* Appleton, 32 Fed. Rep. 855.

McKim (103 U. S. 336), the ground for remanding the cause was that the controversy was not divisible, *nor wholly between* citizens of different States. Mr. Justice Harlan in delivering the opinion declares: "We are of opinion that Congress, in determining the jurisdiction of Circuit Courts over controversies between citizens of different States, has not distinctly provided for the removal from a State court of a suit in which there is a controversy *not* wholly between citizens of different States, and to the full or final determination of which one of the indispensable parties, plaintiffs or defendants, on the side seeking the removal, is a citizen of the same State with one or more of the plaintiffs or defendants against whom the removal is asked."[1]

The converse proposition would seem plainly to follow, that when the controversy is wholly between citizens of different States, and the party seeking the removal is a citizen of a different State from the opposite party, that the removal is allowable, and that this is true under the Act of 1887, provided the party seeking to remove is the defendant. This construction is borne out by numerous authorities. Pirie *v.* Tvedt, 115 U. S. 44; Fidelity Ins. Co. *v.* Huntington, 117 U. S. 280; Louisville & Nashville R. R. Co. *v.* Ide, 114 U. S. 55; Winchester *v.* Loud, 108 U. S. 130. For a

[1] Blake *v.* McKim, 103 U. S. 339.

copious citation of these and kindred authorities, see Anderson *v.* Appleton, *supra.*

It is true that in Ayres *v.* Wiswall, 112 U. S. 187, Chief Justice Waite, for the court, uses the following language: "The rule is now well established that this clause in the section refers only to suits where there exists a separate and distinct cause of action on which a separate and distinct suit might have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of the controversy citizens of different States from those on the other. To say the least, the case must be one separable into parts, so that in one of the parts a controversy will be presented with citizens of one or more States on one side, and citizens of other States on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun [citing Frazer *v.* Jennison, 106 U. S. 191–194]. As has already been seen, this is not such a case. There is here but one cause of action."

Independently of the attitude of the parties, this would seem decisive to deny the right of the resident defendant in a single controversy to remove the same. But from the preceding statement it seems that the Chief Justice's clear and forcible language is modified to the general tenor of the other decisions. The suit was brought for the

foreclosure of a mortgage, and for a personal decree for the unsecured balance of the debt. Wiswall was one of the mortgagors and one of the debtors. The relief sought was against him and other defendants. Ayres, one of the joint debtors, contested the claim. The complainants were citizens of New York. Wiswall, a citizen of New York, and others, citizens of Ohio and Michigan, were defendants, and Wiswall was held to be a substantial and necessary party. The suit was removed to the Circuit Court for the Eastern District of Michigan. The suit therefore was neither *wholly between citizens of different* States, nor was it upon a separate and distinct cause of action, on which a separate and distinct suit might have been brought. It was upon the absence of the last feature that the comment of the Chief Justice is made.

It would be difficult to point out a reason why Congress, by clause 2 of section 2 of the Act of 1887, confined the right of removal in suits containing a single controversy to non-resident defendants, but under clause 3 allowed suits containing two or more controversies to be removed by any defendant without respect to residence.[1]

§ 31. The conclusion seems to be more reason-

[1] If the policy is generally to deny to the resident defendant the right to remove, why should the fact that his controversy is separable from that of his co-defendants, and wholly with citizens of other States, give him that right?

able, that clause 1 was intended to cover Federal questions without regard to citizenship or residence; clause 2, to cover cases where the United States are plaintiffs or petitioners, cases of conflicting land grants from different States, cases of aliens, and also the case where a citizen of a State is sued in the courts of another State where he is travelling or sojourning and yet is a non-resident. It seems that clause 3 was left as it was under the Act of 1875, (omitting the plaintiff's right to remove,) to provide for a removal by a defendant, irrespective of residence, of a suit containing a single controversy, as well as of a suit containing two or more controversies of a separable character, where the controversy is wholly between citizens of different States. The importance of paramount judicial interpretation of this enactment is painfully apparent.[1]

[1] If the ruling in the County of Yuba case, *supra*, § 23, is correct, it will be observed that it applies as well to clause 3 as to clauses 1 and 2 of section 2, and that, except in cases of foreign corporations carrying on business in a State and sued there, (and even that exception would not exist if the words *inhabitant* and *resident* used in the statute be construed as synonymous,) the laws in regard to removals on the ground of citizenship have been practically repealed. Since this case was denied in Fales *v.* R. R. Co., *supra*, Judge Coxe, in Loomis *v.* New York & Cleveland Gas Co., 33 Fed. Rep. 353, has followed the decision of Judges Shiras and Brewer, and holds adversely to Judges Fields, Sawyer, and Sabin. Judge Coxe also states that the same opinion he holds is entertained by Judges Wallace and Lacombe. Still later, in St. Louis, V., & T. H. R. Co. *v.* Terre Haute & I. R. Co., 33 Fed. Rep. 385, Judges Gresham and Allen agree with Judge Shiras, and

§ 32. At this point it would seem proper to consider the method, the time, and the effect of removal of suits under clauses 1, 2, and 3 of sec-

maintain the jurisdiction; and so does Judge Hallett, in Pitkin Co. *v.* Haskell, Id. 386. See also Rawley *v.* Southern Pac. R. R. Co., 33 Fed. Rep. 305; Reinstadler *v.* Reeves, Id. 308.

Separable controversy. — Where a State statute permits judgment to be given against one or more of several defendants sued jointly, it does not necessarily make a separable controversy within the meaning of section 2 of the Act of 1875. Nashville R. R. *v.* Ide, 114 U. S. 52 ; Putnam *v.* Ingraham, 114 U. S. 57. Where trustees, executors, etc., are necessary parties to a cause, their citizenship is a necessary consideration of the right of removal, although it may prevent a removal which could otherwise be made by the parties beneficially interested. Gardner *v.* Brown, 21 Wall. 36; Myers *v.* Swann, 107 U. S. 546 ; Thayer *v.* Life Assoc., 112 U. S. 717; Amer. Bible Soc. *v.* Price, 110 U. S. 61. But where the name of a party is used as a mere formality, see *ante*, § 20, note. The question whether there is a separable controversy is to be determined with reference to the status of the case at the time the petition for removal is filed. Removal Cases, 100 U. S. 457. Issue between plaintiff and garnishee as to liability of latter to defendant is not separable from main suit, and cannot be removed under this clause. Pratt *v.* Albright, 10 Biss. 511. Where a joint cause of action is brought in joint form, separate answers do not make separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to make joint. Railroad Co. *v.* Ide, 114 U. S. 52; Railroad Co. *v.* Wilson, Id. 60; Starin *v.* New York, 115 U. S. 248.

Suits that may or may not be removed. — There must be a controversy. There can be no removal where there is no process, notice, or appearance. *In re* Iowa, &c. Construction Co., 2 McCrary, 178; Berrian *v.* Chetwood, 9 Fed. Rep. 678; McCallon *v.* Waterman, 1 Flippin, 651. Supplemental proceedings to enforce a judgment already obtained, as garnishment after judgment, do not constitute an original suit, and cannot be removed. Hatch *v.* Preston, 1 Biss. 19; West *v.* Aurora, 6 Wall. 139; Cook *v.* Whitney, 3 Woods, 715; Barrow *v.* Hunton, 99 U. S. 80. A suit brought to enjoin a suit at law is only ancillary, and cannot be removed. Cortes Co. *v.* Thannhauser, 9 Fed. Rep. 226; Chit-

tion 2 of the Act of 1887. These are provided for by section 3 as amended.[1] An inspection of this section shows that the language has been

tenden *v.* State, 9 Fed. Rep. 226; Bank *v.* Turnbull, 16 Wall. 190. But it is otherwise where it involves an independent controversy with new or different parties. Buford *v.* Strother, 10 Fed. Rep. 406; Webber *v.* Humphries, 5 Dill. 223; Chapman *v.* Barger, 4 Dill. 557. When the main suit is removed, garnishees are merely nominal parties, and their citizenship will not prevent a removal. Cook *v.* Whitney, 3 Woods, 715. When a proceeding by strangers to an estate against a devisee to annul a will, can be removed from a probate court, see Gaines *v.* Fuentes, 92 U. S. 10. An action of ejectment is removable. Bigelow *v.* Forrest, 9 Wall. 339; Allin *v.* Robinson, 1 Dill. 119; *Ex parte* Turner, 3 Wall. Jr. 258; Forney *v.* Beardsley, 4 Wash. C. C. 242. Where the claim is for an amount not fixed, and which can be ascertained only on trial, the plaintiff may lay damages at any amount. But the amount claimed in the body of the complaint must be looked into, and not alone the prayer for judgment. Gordon *v.* Langest, 16 Pet. 97; Culver *v.* Crawford Co., 4 Dill. 239. Where a defendant makes a counter claim exceeding the amount necessary to give jurisdiction, the suit is removable. Clarkson *v.* Manson, 18 Blatchf. 443.

[1] "That section three of said Act be, and the same is hereby, amended so as to read as follows: —

"Section 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a State court to the Circuit Court of the United States, he may make and file a petition in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the Circuit Court to be held in the District where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and

modified so as to make it conform to the provisions limiting the right of removal to the defendant. In other respects there is no material change except as to the time when the right of removal must be exercised. Under the amended law, the party seeking removal "may make and file a petition in such suit in such State court, at the time, or any time before the defendant is required by the laws of the State, or the rule of the State court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit."[1] Under the law as it stood before the amendment, the petition for removal could be filed "before or at the term at which said cause could be first tried, and before the trial thereof."[2]

entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond, and proceed no further in such suit, and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court."

[1] Under the New York Code of Procedure defendant must serve his answer by the twentieth day after service of the complaint, unless the time is extended by order of court or by written stipulation. Held, that, under the Act of 1887, the cause could not be removed after the twenty days because of an agreement of parties stating that the suit was brought to beguile third persons, and that no answer would be required. Dwyer *v.* Peshall, 32 Fed. Rep. 497. See also B. & O. R. R. Co. *v.* Burns et al., Supreme Court of United States, decided Jan. 8, 1888, not yet reported.

[2] The "term at which said cause could be first tried. and before the trial thereof," Act of 1875, means the first term at which the

§ 33. **Petition for Removal.**—The defendant seeking removal under clauses 1, 2, and 3 must make and file in the State court a petition in the suit, setting forth therein the grounds for the removal. It has been held that this petition need not be verified.[1] The safer practice, however, would be to have the petition verified by the oath of some person having knowledge of the facts.[2]

The grounds upon which the removal is sought need not be stated in the petition, if they otherwise appear in the record, but it is better that they should be set forth in the petition.[3]

cause is in law triable, i. e. in which it would stand for trial, if the parties had taken the usual steps as to pleadings and other preparation. Babbitt *v.* Clark, 103 U. S. 606; Pullman Palace Car Co. *v.* Speck, 113 U. S. 87; Gregory *v.* Hartley, 113 U. S. 742. Cannot be a removal of a cause under Act of 1875 after hearing on demurrer to a complaint, on the ground that it does not state facts sufficient to constitute a cause of action. Alley *v.* Nott, 111 U. S. 472; Scharf *v.* Levy, 112 U. S. 711; Gregory *v.* Hartley, 113 U. S. 742. Party removing cause is estopped from objecting that removal was not made within time. Section 3 of Act of 1875 relating to manner of removal not being jurisdictional, but a mere rule of limitation, its requirements may be waived. Ayers *v.* Watson, 113 U. S. 594; Railroad Co. *v.* Hart, 114 U. S. 654.

[1] Connor *v.* Scott, 4 Dillon, 242; Hauser *v.* Clayton, 3 Woods, 373.

[2] "Objection that a petition for removal (under Act of 1875) was not verified by oath, or that there was delay in filing it, may be waived by delay in taking the objection." Texas, &c. Ry. Co. *v.* Kirk, 115 U. S. 2.

[3] Abranches *v.* Schell, 4 Blatchf. 256; Turton *v.* Union P. R. R. Co., 3 Dill. 366; McFadden *v.* Robinson, 22 Fed. Rep. 10; Bondurant *v.* Watson, 103 U. S. 281.

It has been decided by the Supreme Court of the United States that the requisite citizenship of the parties must exist both at the time the suit is begun and when the petition for removal is filed, and that this rule applies equally to section 639 of the Revised Statutes, and the Act of 1875, and by parity of reasoning will apply to the amending Act.[1]

The petition for removal, when made on the ground of citizenship, should embrace the requisite averments upon that subject.[2]

An amendment to the petition where it is defective should not in general be permitted, because it would be liable to give rise to conflicts of jurisdiction.[3] Its allowance will rest in the sound discretion of the court. It has been allowed when an attorney has misstated the citizenship of the parties.[4]

§ 34. The absence of any acknowledgment or proof of the execution of the bond has been held to be a matter of practice for the State court to

[1] Gibson *v.* Bruce, 108 U. S. 561; Houston, &c. R. R. Co. *v.* Shirley, 111 U. S. 358; Akers *v.* Akers, 117 U. S. 197.

[2] But it has been held by Judge Blatchford that the *petition* need not state that the citizenship existed when the suit was commenced. Chicago, &c. R. R. *v.* McComb, 17 Blatchf. 371.

[3] Endy *v.* Ins. Co., 24 Fed. Rep. 657; MacNaughton *v.* R. R. Co., 19 Fed. Rep. 881.

[4] Barclay *v.* Levee Com'rs, 1 Woods, 254; Hauser *v.* Clayton, 3 Woods, 373; Parker *v.* Overman, 18 How. 137; Hodgson *v.* Bowerbank, 5 Cranch, 303.

pass upon, and not reviewable by the Circuit Court after the State court had accepted the bond.[1] In one of the Removal Cases the bond was signed in the name of the principal by "Grant and Smith, their Att'ys," and there was no acknowledgment of the signature of either the principal or sureties, but it was held to be sufficient.[2] If the bond be defective, a new bond may be substituted in the Federal court.[3] Section 3 of the Act of 1875, relating to manner of removal, not being jurisdictional, but a mere rule of limitation, its requirements may be waived.[4]

(As to formalities of the bond, see note under Form No. 9 in the Appendix.)

[1] Cooke *v.* Seligman, 17 Blatchf. 452.

[2] Removal Cases, 100 U. S. 457.

[3] Harris *v.* Railroad, 18 Fed. Rep. 833.

[4] Ayres *v.* Watson, 113 U. S. 594; Railroad Co. *v.* Hart, 114 U. S. 654.

CHAPTER V.

LOCAL PREJUDICE.

§ 35. **Clause 4**[1] **of Section 2** is of great importance to the jurisdiction of the Circuit Court. It has been observed that, in every clause heretofore discussed, an absolute essential to the jurisdiction is that the suit is *of a civil nature* at common law or in equity, and the matter in dispute, to use the language of Mr. Justice Gray in Kurtz *v.* Moffitt,[2] "exceeds the sum or value of a certain

[1] Clause 4: "And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper District, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein."

[2] Kurtz *v.* Moffitt, 115 U. S. 498; see also Gaines *v.* Fuentes, 92 U. S. 510.

number of dollars." The language of the clause under discussion is radically different. It is: "And where *a suit*[1] is now pending, or may be hereafter brought, in any State court in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant may remove such suit into the Circuit Court of the United States."[2] It embraces in its comprehensive scope all controversies between citizens of different States without regard to amount. The change is most significant. This is a distinct and independent clause. It is impossible to make it depend upon preceding sections; it comprehends the isolated, and to the previous clauses the foreign, topic of local prejudice. It is in effect a statute in itself,

[1] The word *suit* in the 25th section of the Judiciary Act of 1789 applies to any proceeding in a court of justice in which the plaintiff pursues in such court the remedy which the law affords him. An application for a prohibition is a suit. 2 Pet. 449; 2 Bouvier's Law Dict. 558. "In modern law, the prosecution of some claim or demand in a court of justice; judicial prosecution: — the formal method of pursuing and recovering one's right in a court of justice; an action; a case." Worcester's Dictionary, "Suit."

[2] As to the effect of the omission of the limitation "suits of a civil nature at common law or in equity," see New Hampshire *v.* Grand Trunk R. R. Co., 11 Reporter, 80; Reson *v.* Cribbs, 1 Dill. 181; Green *v.* United States, 9 Wall. 655; Webber *v.* Humphreys, 5 Dill. 223; Washington Improvement Co. *v.* Kansas & P. R. R. Co., 5 Dill. 489; Weston *v.* City of Charleston, 2 Pet. 449; Holmes *v.* Jennison, 14 Pet. 540; *Ex parte* Millegan, 4 Wall. 2; West *v.* Aurora, 6 Wall. 139; Story, Com on Const., §§ 1645, 1647. See also language of sect. 640, Rev. Stat.

and it necessarily extends the right of removal to all controversies between citizens of different States, where it is made to appear to the Circuit Court that from prejudice or local influence the party seeking to remove will not be able to obtain justice in the State courts.

Where there is no ambiguity in a statute there is no room for construction, and there is no ambiguity here. It may be said that the general purpose of the Act of 1887 was to decrease and weaken the jurisdiction of the Federal courts. That is no doubt true, and it may not be improper to remark, that so effectually has this reactionary purpose been carried out that their usefulness in the enforcement of contracts has been most dangerously impaired. This is especially true in those sections where the holdings of property values are small, and where a large proportion of the commercial contracts made with merchants in the trading centres of other States are less than $2,000 in the amount involved. But where a law is plain and unambiguous, no matter what is their purpose the legislature should be taken to intend what they have plainly expressed.[1] In his first general maxim of interpretation Vattel declares it is not allowable to interpret what has no need of interpretation.

[1] U. S. *v.* Fisher, 2 Cranch, 358; Doe *v.* Considere, 6 Wall. 459; Ruggles *v.* Illinois, 108 U. S. 526.

The conclusion is obvious, and apparently indisputable, that, where the other requisites exist, the power to remove from the State to the Federal court, on the ground of local prejudice against the petitioner extends to all controversies without regard to amount, to all suits whether they can be estimated in dollars and cents or not, and this has been expressly decided since the Act of 1887.[1]

§ 36. It is quite possible that in this far reaching statute Congress intended to correct the mischief pointed out in Kurtz *v.* Moffitt, *supra.*[2] There it was held, that, before the suit could be removed, it must have the money value fixed by the statute. Now if local prejudice is a ground of removal from the local court in any controversy between citizens of different States, there is no reason why it should not have the same effect in all controversies. Undeniably there is often much local excitement and prejudice on the trial of proceedings for divorce, habeas corpus, or other suits where the matter in dispute cannot be estimated and ascertained in money. The Federal courts are not courts where non-residents have an undue advantage, and it is no injustice to residents to require them to litigate therein their controversies with citizens of other States.

[1] Fales *v.* Chicago, &c. R. R. Co., 32 Fed. Rep. 673.

[2] *Ante*, § 35.

§ 37. Another innovation upon the established practice is the feature of this clause providing that the removal proceedings shall be commenced by making it appear to the United States Circuit Court, that from prejudice or local influence the party seeking removal will not be able to obtain justice in the State court where the suit is pending, or in any other State court to which under the laws of the State he may have the right, on account of such prejudice or local influence, to remove said cause. As to the manner in which prejudice or local influence is to be made to appear to the satisfaction of the Circuit Court, the statute is silent. That it is by affidavit, as under the Local Prejudice Act of 1867, is the most natural intendment.[1] Construing this provision of the Act of 1887 in Fisk *v.* Henarie and others,[2] Judge Deady, presiding in the Circuit Court for the District of Oregon, held that, where such an affidavit was made by two of several defendants,

[1] The language of the statute seems however to rest a broader discretion in the court, and there can be no question that under this statute the affidavit may be made for the party seeking removal by some proper person having knowledge of the facts. See *ante*, § 17, general note.

[2] Fisk *v.* Henarie et al., 32 Fed. Rep. 417. See also decision of Judge Newman in Hill *v.* R. R. Co., 33 Fed. Rep. 81. This case is interesting in that it holds that the law giving plaintiffs the right to remove for local prejudice is not changed, except that the court may examine into the sufficiency of the grounds. But see decision of Judge Brewer, in Short *v.* R. R. Co., 33 Fed. Rep. 114.

the affidavit not being a matter of jurisdiction, but only a condition imposed upon the party seeking the removal, it cannot be questioned or contradicted; nor is it necessary that the affiant should state the grounds of his belief; and that the provision for examining the truth of the *plaintiff's* affidavit, in pending cases and cases not yet entered,[1] is a legislative construction of the Act, to the same effect.

§ 38. A peculiarity of this statute is, that it provides no method for making the action of the Federal court known to the State court, nor for obtaining a transcript of the proceedings in the State court. Unlike former acts upon this subject, it makes no provision for a bond conditioned to pay costs in case the Circuit Court shall decide that the suit was improperly removed, and for entering a copy of the record in the Circuit Court; nevertheless, section 3 of the Act states that this clause provides for its own method of removal. Since, however, the application is made to the Circuit Court, that court is in a position to determine in the first instance whether the cause is properly removable; and when it has so determined, it has the power to obtain a transcript of the record of the State court by *certiorari*, or custody of the person held under State process, by *habeas corpus cum causa*, or by other appropriate

[1] See clause 5 of section 2. See as to Act of 1867, 1 Dill. 298.

writ.[1] In fact in cases of habeas corpus and kindred proceedings the method of removal provided for under the Act of 1867 would not be adequate. This is, however, held to be still of force.[2]

§ 39. Another innovation is the feature of this clause giving to any defendant, citizen of another State, the right of removal of any suit in which there is a controversy between such defendant and a citizen of the State in which it is pending, and providing that if it appear that the suit can be fully and justly determined as to the other defendants in the State court, and that no party to the suit will be prejudiced by a separation of the parties, the Circuit Court may remand the suit, so far as it relates to the other defendants whose rights will not be prejudiced in the local tribunal. It will be observed, that on this point this clause differs materially from the second clause of section 2 of the Act of 1875 and other previous Acts in the following respect. The question whether

[1] Section 716, Rev. Stat. See also section 7 of Act of 1875, which has not been repealed by Act of 1887. See also Certiorari, *post*, § 50. Habeas Corpus. *In re* Wells, 3 Woods, 128.

[2] Judge Deady held that so much of the Act of 1867 as provided for the manner of removal is not in conflict with the Act of 1887, and is not repealed by the latter, and that those provisions may be applied to clause 4. Fisk *v.* Henarie, *supra*. If a cause is brought into the Circuit Court by that method, the requirements of clause 4 would doubtless be fulfilled, and there could be no valid objection thereto in the Circuit Court. But whether the State court in the first instance would be bound to take notice of proceedings thus instituted might present a difficulty.

the suit contains a separable controversy is to be determined *after* the Circuit Court has taken jurisdiction of the cause. If not separable, the Circuit Court is to *retain* jurisdiction of the entire suit. If the suit contains separable controversies, it may be remanded so far as it relates to the other defendants, provided, as we have seen, that no party will be prejudiced thereby.

§ 40. In the opinion in Fisk *v.* Henarie, *supra*, Judge Deady called attention to this interesting feature: "Before the Act of 1887," said the learned Judge, "this action could not have been removed to this court by either of the defendants, for some of them are citizens of the same State with the plaintiff. But by the Act of 1887 the foundation of the right of removal is the mere pendency of a suit in a State court in which there is a controversy between a citizen of the State in which it is brought and a citizen of another State. . . . Nor can the right of removal thus given to 'any' defendant having the prescribed citizenship, with any respect for the ordinary significance of language, be construed to include 'all' the defendants, and so be denied to 'any' unless 'all' have such citizenship.[1] . . . Admitting this to be the proper construction of the statute, counsel for the plaintiff insists that

[1] See remark of Mr. Justice Harlan, in Blake *v.* McKim, 103 U. S. 338.

it is unconstitutional. The question whether Congress has the power to provide for the removal of a case from a State to a National court, in which some of the necessary parties defendant are citizens of the same State with the parties plaintiff, or some of them, has not been directly decided by the Supreme Court. It was argued before that tribunal, with marked ability and research, in the case of The Sewing-Machine Cases, 18 Wall. 553. But, as the court held that Congress had not then undertaken to confer such power on the Circuit Courts, it was not decided." But Judge Deady holding that the language of Article III., § 2, of the Constitution, "controversies between citizens of different States," cannot be interpreted "controversies *exclusively* between citizens of different States," the constitutionality of the power was maintained. The learned discussion of this question, and the high character of the judge presiding, entitle this opinion to great weight.[1] It follows that a party may remove on this ground, irrespective of the action of co-defendants.[2]

§ 41. To obtain the benefit of this clause, the suit must be removed "at any time before the trial."

[1] See also Lockhart *v.* Horn, 1 Woods, 628.

[2] This is altogether different from the Act of 1867. That required all necessary parties seeking removal to unite. *Ante*, § 17.

Defining this language, and reviewing the decisions on this point on the Act of 1867, Judge Deady[1] holds that "before the trial" means before the final trial, and that a suit may be removed under this clause although there may have been any number of mistrials, or trials in which the verdict was set aside or the jury disagreed.[2]

On the other hand, Judge Key[3] holds that the failure to use the words "or final hearing" in clause 4 was intentional, and indicated a purpose to make this provision conform to the rulings of the Supreme Court on the Act of 1875. The language of the Act of 1875 is, "at or before the term at which said cause could be first tried, and before the trial thereof." Construing this, the Supreme Court held that it is too late to remove a cause after a general demurrer has been overruled, even though the State court grants a new trial.[4] It will be observed, however, that in the same case a distinction is made between causes removed under the Act of 1875 and under the Act of 1867; and in Hess *v.* Reynolds, 113 U. S. 73, the necessity for greater latitude in causes removed because of local prejudice is strongly presented, and is the controlling point.

[1] Fisk *v.* Henarie, *supra.*

[2] Insurance Co. *v.* Dunn, 19 Wall. 214; Vannevar *v.* Bryant, 21 Wall. 41.

[3] Lookout Mountain R. R. Co. *v.* Houston & Co., 32 Fed. Rep. 710.

[4] Alley *v.* Nott, 111 U. S. 472.

§ 42. **Clause 5**[1] **of Section 2** has caused much perplexity. It has been held that it is merely an "independent temporary provision," intended to apply to suits pending in the Circuit Court at the time of the passage of the Act, and that the words "may hereafter be entered therein" by the "plaintiff" have reference to suits where proceedings to remove had been instituted under the Act of 1867, in the State court, before the passage of the Act of 1887, but the clerical work of entering a copy of the record in the Circuit Court had yet to be performed.[2] But in Hill *v.* Richmond and Danville R. R. Co., 33 Fed. Rep. 81, Judge Newman holds "that even as to plaintiffs the right to remove by affidavit still exists," subject to an examination by the Circuit Court, "after the case reaches it, as to the sufficiency of the grounds of removal." The provisions of this clause are of course not applicable to suits removed under

[1] Clause 5: "At any time before the trial of any suit which is now pending in any Circuit Court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe, and did believe, that, from prejudice or local influence, he was unable to obtain justice in said State court, the Circuit Court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto." The affidavit required by this clause must be made by the party in person. Duff *v.* Duff, 31 Fed. Rep. 772.

[2] Fisk *v.* Henarie, 32 Fed. Rep. 417.

clause 4 of section 2 of the Act of 1887, because the plaintiff is not given the right to remove a suit under that clause.

It would be difficult to devise a more painful and invidious duty for the exercise of the Federal courts than that imposed upon them by this statute. They must, it seems, pass judicially upon the integrity and fairness of State courts, and upon the temper, sense of justice, and good conduct of local communities. Had it been desired to neutralize the great increase in the usefulness of the National courts caused by their more intimate association with the people of the several States, and by the increasing appreciation of the utility and beneficence of the jurisdiction they exercise, the clause could scarcely have been more effectively devised.

CHAPTER VI.

IS THE LOCAL PREJUDICE ACT OF 1867 REPEALED?

§ 43. Is the prejudice or local influence Act of 1867 (sub-section 3 of section 639, Rev. Stat.) repealed by the Act of 1887?

This question has been thought debatable. The Act of 1887, after repealing in express terms certain sections heretofore referred to, is in these words: "And all laws and parts of laws in conflict with the provisions of this Act be, and the same are hereby, repealed."[1] The general repealing clause of the Act of 1875 differed from this only in the use of the word "Acts," instead of the word "laws."

In Hess *v.* Reynolds,[2] Mr. Justice Miller, for the court, declares: "The usual formula of a repealing clause intended to be universal is, that all Acts on this subject, or all Acts coming within its purview, are repealed, or the Acts intended to be repealed are named and specifically referred to. In this case the effect of the statute as a repeal by implication arising from inconsistency of pro-

[1] Section 6, Act of March 3, 1887.

[2] Hess *v.* Reynolds, 113 U. S. 73. See *ante*, § 18.

visions, or from the supposed intention of the legislature to substitute one new statute for all prior legislation on that subject, is not left to its usual operations, but the statute to be repealed must be in conflict with the Act under consideration, or that effect does not follow. . . . We do not think this provision (Act of 1867) is embraced in the Act of 1875, which says nothing about prejudice or local influence, and is not in conflict with that Act. We are of opinion that this clause of section 639 remains, and is complete in itself, furnishing its own peculiar cause of removal, and prescribing, for reasons appropriate to it, the time within which it must be done. One of these is, that the prejudice may not exist at the beginning, or the hostile influence may not become known or developed at an earlier stage of the proceeding. Congress therefore intended to provide against this local hostility whenever it existed up to the time of trial."

It is insisted that this reasoning applies with equal force to the repealing effect of the Act of 1887, and a very plausible argument may be made to this purport. Indeed, Judge Newman, presiding in the Circuit Court of the Northern District of Georgia, holds that the right of the plaintiff to remove still exists.[1]

[1] Hills *v.* Richmond & Danville R. R. Co., 33 Fed. Rep. 81. See *ante*, § 42, note.

But in King *v.* Cornell,[1] in which it was held that subsections 1 and 2 of section 639 of the Revised Statutes were repealed, the following language was used: "While repeals by implication are not favored, it is well settled that, where two Acts are not in all respects repugnant, if the later covers the whole subject of the earlier, and embraces new provisions which plainly show that it was intended as a substitute for the first, it will operate as a repeal."[2]

The fourth clause of the Act of March 3, 1887, treats exclusively the topic of removals on the ground of Prejudice and local influence, and provides for a method of removal radically different, as we have seen, from that of the former prejudice Act; and, in harmony with the other clauses of the amendatory Act, the right of removal is restricted to the defendant. In respect to the character of the suits removable under clause 4, the jurisdiction has been much enlarged. It would appear, therefore, that the one Act was intended as a substitute for the other, and that sub-section 3 of section 639 has been repealed by implication.[3]

[1] 106 U. S. 396.

[2] See also Baltimore & Ohio R. R. Co. *v.* Bates, 119 U. S. 464; Ayres *v.* Watson, 113 U. S. 594; Holland *v.* Chambers, 110 U. S. 59; Hyde *v.* Ruble, 104 U. S. 407.

[3] This is the conclusion also reached by Judge Deady in Fisk *v.* Henarie, *supra.*

General Note. — The following argument has been suggested to show that the Act of 1867 was not repealed by the Act of 1887, and that the plaintiff may still remove under that Act.

Sub-section 3 of section 639, Rev. Stats., Act of 1867, is not *expressly* repealed by the Act of 1887. Repeals by implication are not favored, and, if repealed at all, it must be by reason of the fact that the later statute so far covers the subject of the former, and embraces such new provisions, as to make it plainly appear that the one was intended as a substitute for the other. King *v.* Cornell, 106 U. S. 396.

Clause 4 provides for cases of a different class from those provided for in the earlier Act. It provides in effect for suits for divorce, habeas corpus, and other suits not of a monetary character. *Ante*, § 35. It also provides for suits of a sum or value less than $500. This was intended as a popular measure, to meet the cases where men of limited means and influence are sued in a State remote from their homes. And it was intended to enable them to remove such suits without giving the bond required by the previous statute. It was also intended to allow the removal of suits in which there was a proper diversity of citizenship, but which could not be removed under the former Acts, by reason of the fact that there was no separable controversy therein. *Ante*, § 39, and § 28. The accomplishment of these ends is not inconsistent with the rights of removal given in sub-section 3 of section 639, and the mere fact that a defendant in certain cases might remove a cause under either Act would not show that the one Act was intended as a substitute for the other. Canal Co. *v.* Hart, 114 U. S. 654. The Supreme Court held that sub-section 3 of section 639, Rev. Stat., was not repealed, for the reason that the cases provided for by it were not provided for by the Act of 1875. Baltimore & Ohio R. R. Co. *v.* Bates, 119 U. S. 464. Apply this reasoning here. A comparison of those two Acts will show that every case which could be removed under the earlier Act could be removed under the later, except cases in which local prejudice is developed between the first term at which the cause could be tried and the final trial in the State court. Now the case of the plaintiff desiring to remove a cause on the ground of local prejudice is not provided for under clause 4 of section 2 of the Act of 1887. It has been said that the general purpose of the Act was to restrict the jurisdiction by raising the limit as to amount, and cutting off all right of removal from the plaintiff. But because it is the general purpose of the Act to restrict the jurisdiction of the Circuit Court by increasing

the limit to $2,000, it cannot be fairly inferred that the intention was to repeal sub-section 3 of section 639, Rev. Stat., where the topic is local prejudice. The general purpose to restrict the jurisdiction where it is sought purely on the ground of *citizenship* is manifest both from section 1 and from clauses 1, 2, and 3 of section 2 of the Act of 1887; but it is equally apparent from clause 4, that, where *citizenship* and *local prejudice* is the ground, the purpose was to extend the jurisdiction as to amount, and also as to the character of the suits to be removed.

If we look to the rights of the plaintiff, we see that it was the purpose of Congress by sub-section 3 of section 639 to provide for local influence or prejudice which might arise against him after he had sought the State court as his forum, and up to the time of trial. *Ante*, § 43. And yet no provision is made for the plaintiff by clause 4. Nor is it a sound argument to say that the general purpose of the Act was to take away the right of removal from the plaintiff; for the right of the plaintiff to come into the court through its original jurisdiction is still preserved by section 1; and clauses 1, 2 and 3 of section 2 of the amended Act take away the right of removal from the plaintiff, because the grounds of removal under those clauses are citizenship, or subject matter, grounds which existed and which could be as well known to the plaintiff before he elected the State court as his forum as afterward; but this plainly does not guard against the case of local influence or prejudice, which may arise against the plaintiff after the election of his forum. This danger to the plaintiff is prevalent and serious.

Moreover, clause 5 of section 2 is an amendment of the Act of 1867. The fact that an Act is amended in a particular not inconsistent with the idea of its continuing force, and that the amending Act is silent as to whether it is repealed, raises a strong presumption that it was not intended to be repealed. Besides the express reference in the clause to "any suit now pending or which may hereafter be entered" in the Circuit Court, and which "has been removed by the plaintiff," is very significant of the existence of his right to remove. The suggestion of Judge Deady, that it was merely for "temporary" application to suits in process of removal, (*supra*, § 42 and note,) is not altogether satisfactory.

Every suit, in which a plaintiff had filed his petition, affidavit, and bond for removal in the State court before the passage of the Act of 1887, was "pending" in the Circuit Court, whether the transcript of the record from the State court was actually entered in the Circuit Court or not. Steamship Co. *v.* Tugman, 106 U. S. 118.

All such suits were therefore covered by the provision in clause 5 for "any suit which is now pending in any Circuit Court"; and the further provision, "or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff," can have no legal effect whatever, unless we understand from it that the Act of 1867 is to be continued of force, except that, when the plaintiff quits the forum of his own selection, the court may, on motion of the other party, inquire into the grounds of his belief, that from local prejudice his rights will be there denied.

This view, it is insisted, is strengthened upon consideration of the fact that section 7 of the Act of 1875, providing for misfeasance of the clerk of the State court, certiorari, etc., was neither repealed nor amended by the Act of 1887, and that still provides the remedy for both the plaintiff and the defendant. It will not do to say that this was overlooked, because the latter clause of section 5 just above it was not overlooked, nor was it omitted to except section 8 (see *post*, § 50) from what would have been the repealing effect of section 1 of the amended Act.

In this view, the Act of 1867 is not repealed by implication, but is expressly recognized.

CHAPTER VII.

REMANDING CAUSES TO THE STATE COURTS.

§ 44. **When and how remanded.** — Section 5 of the Act of March 3, 1875, provides, that if it shall appear to the satisfaction of the Circuit Court, at any time after a suit has been removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within its jurisdiction, or that the parties to the suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the Act, the Circuit Court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

§ 45. The last clause of the section provided that the order remanding a cause shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be. This clause has been repealed by the Act of 1887, and in lieu thereof it is provided that such remand shall be immediately carried into execution, and no appeal

or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed.[1] This provision has been construed by the Supreme Court of the United States in Railroad Co. *v.* Dunn, 122 U. S. 513, in the following language: "If decided against the removal, the question is now, by the Act of March 3, 1887, c. 373, 24 Stat. 552, put at rest, and the jurisdiction of the State court established in the appropriate way."[2]

It cannot be doubted, that, if the Circuit Court refuses to remand the cause, the question of jurisdiction may be decided by the Supreme Court on writ of error or appeal after final judgment, under the same rules which obtained prior to the enactment of the Act of March 3, 1887.[3] If the case be one, however, in which the State court insists on retaining jurisdiction of the suit, it

[1] Clause 6 of section 2, Act of 1887: "Whenever any cause shall be removed from any State court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed."

[2] Where a cause has been removed under the Act of 1875, and remanded, there can be no appeal to the Supreme Court from the order of the Circuit Court since March 3, 1887, and even if the order to remand was made before that date, it is too late to appear for writ of error after that date. Sherman *v.* Grinnell et al., 123 U. S. (decided Dec. 12, 1887); Morey *v.* Lockhart, 123 U. S. (decided Oct. 24, 1887); Wilkinson *v.* Nebraska, 123 U. S. (decided Nov. 14, 1887); volume not yet published.

[3] Ayers *v.* Chicago, 101 U. S. 184.

may reach the Supreme Court of the United States by way of the Supreme Court of the State;[1] and if the Supreme Court of the United States should sustain the decision of the State court, it would place the case in a very anomalous situation, particularly if the question involved related merely to the manner of removal, and was not so fundamental as to make the judgment of the Circuit Court *coram non judice*.[2]

§ 46. A Federal court is not bound by a removal of a cause from a State court, but may remand it if sufficient ground for jurisdiction do not appear; and this may be done even after final decree on the merits, if order to remand is made before the close of the term.[3] When the transcript of the record is not filed in the Circuit Court within the time prescribed by the statute, the Circuit Court is vested with discretion to determine whether it will remand the cause or retain jurisdiction.[4]

The question of jurisdiction is usually raised in the Circuit Court by a motion to remand, when the absence of jurisdiction or other defect appears on the face of the record. If the jurisdictional facts alleged in the petition are denied, the issue

[1] *Post*, § 49.

[2] Ayres *v.* Watson, 113 U. S. 594.

[3] Ayres *v.* Wiswall, 112 U. S. 187.

[4] St. Paul & Chicago R. R. *v.* McLean, 108 U. S. 212; Baltimore & Ohio R. R. *v.* Koontz, 104 U. S. 5; Steamship Co. *v.* Tugman, 106 U. S. 118.

must be raised by plea in abatement. If the court has reason to doubt the existence of the jurisdictional facts, it has the power to examine the parties, or to direct a plea in abatement to be filed and heard, in order to determine the question at the outset;[1] or where the want of jurisdiction is apparent upon the face of the record, to dismiss the suit on its own motion.[2] But those provisions of the statute which relate to the time and manner of removal are not essentially jurisdictional, and may be waived.[3]

When a party initiates a proceeding to remove a cause, but does not enter the record, the opposite party may without leave enter a copy of the petition, order, and bond, and move to remand the suit.[4]

§ 47. **Effect of Removal on subsequent Proceedings in State Court. Remedy when State Court persists in retaining Cause.**— Any proceeding in the cause in the State court after the right of removal has attached, is erroneous; and if any be had, the State court of error should examine the proceedings for removal, and reverse the judgment, without a plea

[1] Gribble *v.* Pioneer Press Co., 15 Rep. 547.

[2] Mackaye *v.* Mallory, 19 Blatchf. 165; Bible Society *v.* Grove, 101 U. S. 610.

[3] Ayres *v.* Watson, 113 U. S. 594.

[4] Anderson *v.* Appleton, 32 Fed. Rep. 855. Where a cause was remanded, and it was attempted to make a second removal, it was not allowed, although in time. McLean *v.* Chicago, 16 Blatchf. 369.

to the jurisdiction, whatever the state of the record or the provisions of the State law as to the consideration of questions not on the record.[1]

If the defendant have a right to a removal, he cannot be deprived of it by the allowance by the State court of an amendment reducing the sum claimed, after the right of removal is complete.[2]

Where a cause has been duly removed, but the State court nevertheless proceeds to an adjudication, the party who procures the removal may contest the suit there without waiving his right to question the jurisdiction so usurped, when the proceedings are subsequently carried to the Supreme Court.[3]

Notwithstanding the refusal of a State court to make an order for removal, on the filing of the requisite petition and bond in a removable suit, the State court is divested of jurisdiction, and its subsequent orders are *coram non judice*.[4] Nor is the jurisdiction restored by a failure to file a transcript of the record in the Circuit Court within the time prescribed by statute, nor by the consent of

[1] Kanouse *v.* Martin, 15 How. 198. [2] Ibid.

[3] Home Ins. Co. *v.* Dunn, 19 Wall. 214; Meyer *v.* Delaware R. R. Co. (Removal Cases), 100 U. S. 457; New Orleans, &c. R. R. Co. *v.* Mississippi, 102 U. S. 135; Kern *v.* Huidekoper, 103 U. S. 485.

[4] Kern *v.* Huidekoper, 103 U. S. 485; Nat. Steamship Co. *v.* Tugman, 106 U. S. 118. The latest authority on this point under the Act of 1887 is the case of Wilson *v.* Telegraph Company, decided by Mr. Justice Field in the Circuit Court for the Northern District of California, March 19, 1888, and not yet reported.

the party claiming the right of removal, that the issues be heard by a referee, nor by his contesting the case before the referee and in the State court.[1]

Where the right of removal exists, but is denied by the State court, which forces the parties to trial therein, no rights are lost by a failure to enter the record and docket the cause in the Federal court on the first day of the next term. The entry may be allowed by the Circuit Court after the action of the State court has been declared illegal by the Supreme Court.[2]

§ 48. The Federal court to which a case is removed may enjoin the plaintiff from attempting to enforce, by suit in another State, a judgment obtained by him, notwithstanding the removal, in the court from which the case was removed.[3]

If a State court insist on proceeding with a cause properly removed to a Federal court, the remedy is by writ of error after final judgment to the State Supreme Court, and thence to the Supreme Court of the United States.[4]

§ 49. Relying upon the following expression in the case of Railroad Co. *v.* Dunn, 122 U. S.

[1] Nat. Steamship Co. *v.* Tugman, 106 U. S. 118.

[2] Baltimore & Ohio R. R. Co. *v.* Koontz, 104 U. S. 5.

[3] French *v.* Hay, 22 Wall. 250; see also Dietch *v.* Huidekoper, 103 U. S. 494. In this case the Circuit Court had jurisdiction of the person and the subject matter, and the defendant was enjoined from a proceeding in the probate court of the State which would have disposed of the suit.

[4] Chesapeake & Ohio R. R. Co. *v.* White, 111 U. S. 134.

513: "It [the petition] presents then to the State court a pure question of law; and that is, whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit; that question the State court has the right to decide," — Judge Benedict, in Beadleston *v.* Harpending and another, 32 Fed. Rep. 644, holds: "Where, on application by a defendant in a suit in a State court to remove the cause to the United States Circuit Court, the State court, being of competent jurisdiction, has decided that on the face of the record the defendant is not entitled to such removal, he will not be permitted to contend for a contrary decision of the same point in the Circuit Court, upon a motion by plaintiff to remand the cause as not being removable," and that because of the decision of the State court the suit must be remanded. It would be difficult to overestimate the far-reaching consequences of this decision if its conclusion is accepted.

It would seem, however, that Judge Benedict overlooks the fact that in the case quoted the Supreme Court go on to say: "But even though the State court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his peti-

tion, in the Circuit Court, and have the suit docketed there. . . . The questions in the two courts will be identical, and will depend on the same record, namely, that in the State court ending with the petition for removal. The record remaining in the State court will be the original; that in the Circuit Court an exact copy. . . . But, inasmuch as the petitioning party has the right to enter the suit in the Circuit Court, notwithstanding the State court declines to stop proceedings, it is easy to see that, if both courts can try the issues of fact which may be made on the petition for removal, the record from the two courts brought here for review will not necessarily always be the same. The testimony produced before one court may be entirely different from that in the other, and the decisions of both courts may be right upon the facts as presented to them respectively. Such a state of things should be avoided if possible, and this can only be done by making one court the exclusive judge of the facts. Upon that question there ought not to be a divided jurisdiction. It must rest with one court alone, and that in our opinion is more properly the Circuit Court. The case can be docketed in that court on the first day of the next term, and the issue tried at once. If decided against the removal, the question is now, by the Act of March 3, 1887, c. 373, 24 Stat. 552,

put at rest, and the jurisdiction of the State court established in the appropriate way."

This appears to be decisive of the question. The issues of law appearing upon the face of the record, both the State court and the United States Circuit Court have jurisdiction to try. It is the duty of the Circuit Court to adjudicate every question arising in the record. But issues of fact arising on the question of removal must be tried exclusively in the Federal court.[1]

§ 50. **Certiorari.** — Section 7 of the Act of 1875 confers upon the Circuit Court power to issue a writ of certiorari to the State court to compel a return of the record in the cause, and provides that the clerk may be criminally punished if, after a tender of his fees, he refuses to furnish the party applying for it a copy of the record. This is still of force, and applies to removals under the Act of 1887.

§ 51. The writ of certiorari is unnecessary when the record of the State court is already before the Federal court.[2] A defect or omission in the record may be cured by certiorari.[3]

[1] Stone *v.* South Carolina, 117 U. S. 430; Carson *v.* Dunham, 121 U. S. 421.

[2] Scott et al. *v.* Clinton, &c. R. R. Co., 8 Ch. L. N. 210; s. c. Bissell, 529; *In re* Wells, 3 Woods, 128.

[3] Dennis *v.* Alachua Co., 3 Woods, 683; Cook *v.* Whitney, 3 Woods, 715.

Writ of certiorari: *Ex parte* Van Orden, 3 Blatchf. 166; Patterson *v.* U. S., 2 Wheat. 221; *Ex parte* Martin, 5 Blatchf. 303; *Ex*

§ 52. The remedy against the clerk for refusal to deliver a copy of the record under the Removal Act of 1867 was provided for, in section 645 of the Revised Statutes. Whether or not section 7 of the Act of 1875 applied to the removal of causes under the Act of 1867 has been a matter of doubt.[1] If the method provided by the Act of 1867 be not repealed by the Act of 1887, as it has been held, Fisk *v.* Henarie, *supra*, it would seem that the doubt would now be resolved in the affirmative, since the latter Act is amendatory of the Acts of 1867 and 1875.

§ 53. **Proceedings in the Federal Court after Removal.**— Section 6 of the Act of March 3, 1875, provides that the Circuit Court of the United States shall, in all suits removed under the provisions of the Act, proceed therein as if the suit had been originally commenced in the Circuit Court, and the same proceedings had been taken in such suit in said Circuit Court as shall have been had therein in the State court prior to its removal.[2]

§ 54. This provision does not break down the barrier between the common law and equity jurisdiction of the United States Circuit Courts. The

parte Stupp, 12 Blatchf. 501; *Ex parte* Bollman, 4 Cranch, 75; *Ex parte* Buford, 3 Cranch, 75; U. S. *v.* Young, 94 U. S. 258; *Ex parte* Vallandigham, 1 Wall. 243; U. S. *v.* Adams, 9 Wall. 661.

[1] Benchley *v.* Gilbert, 8 Blatchf. 147; Osgood *v.* C. D. & V. R. R. Co., 6 Biss. 330.

[2] See sections 4 and 6 of Act of 1875, Appendix, pp. 99, 100. See also section 639, Rev. Stat.

pleadings and practice in equity causes in the Federal courts are governed by the practice of the Court of Chancery as it existed at the time of the adoption of our Constitution, and as modified by the rules prescribed by the Supreme Court of the United States.

Where the suit as it comes from the State court unites legal and equitable grounds of relief, or where the defendant's plea is in its nature equitable, as is frequently the case under the State practice, it is necessary to recast the pleadings[1] and separate the legal and equitable relief sought into their appropriate branches of the United States court. Where the suit has been proceeding at law, when it is entirely an equitable suit under the Federal practice, the pleadings must be recast as a suit in equity, and the Circuit Courts have power to make all necessary orders to this end.[2]

§ 55. In common law cases in which no equitable relief is sought, no repleader is necessary since the adoption of the Practice Act of June 1, 1872.[3]

§ 56. Where a suit is removed from a State court, it brings with it, as an incident, all costs

[1] Section 913, Rev. Stat.; Hurt *v.* Hollingsworth, 100 U. S. 100.

[2] Fisk *v.* Union Pacific R. R. Co., 8 Blatchf. 299; Partridge *v.* Ins. Co., 15 Wall. 573; La Mothe Mfg. Co. *v.* Nat. Tube Works, 15 Blatchf. 432; Mfg. Co. *v.* Memphis, &c. Co., 19 Fed. Rep. 273; Myrick *v.* Heard, 31 Fed. Rep. 97; West *v.* Bowker Fertilizers Co., Report.

[3] Section 914, Rev. Stat.

which accrued under the State law prior to removal.[1]

§ 57. **Conclusion.** — It may not be improper, in concluding the discussion of this important subject, to state that the author has attempted to lessen the labor of the student by restricted citation of precedents. The subject is capable of indefinite expansion; the decided cases having some relation to it are numerous and elaborate; but it has been attempted to place before the profession a brief analysis, with such pertinent and controlling decisions as will serve to facilitate investigation, to make easily understood statutes intricate and involved, but of supreme importance to the interstate business of the country, to the confidence of investors, to the integrity of commercial contracts, and to the usefulness and effectiveness of those National courts, which, from the organization of the Government, have contributed immeasurably to the prosperity of the people and the stability of the Federal system.

[1] Wolf *v.* Ins. Co., 1 Flip. 377; Scupp *v.* Champbell, 3 Cent. L. J. 521.

APPENDIX.

APPENDIX A.

COMPARISON OF THE ACT OF MARCH 3, 1875, AND SECTION 639, REVISED STATUTES, WITH THE ACT OF MARCH 3, 1887.

THE provisions of the Act of March 3, 1875, and those of the Act of March 3, 1887, are shown below in parallel columns, those parts of sections 1, 2, and 3 of the former Act which do not appear in the latter Act, and those parts of the latter Act amending sections 1, 2, and 3 of the former Act which do not appear in the former Act, being in *Italic*.

CHAP. 137.	CHAP. 373.
AN ACT TO DETERMINE THE JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES, AND TO REGULATE THE REMOVAL OF CAUSES FROM STATE COURTS, AND FOR OTHER PURPOSES. — Approved March 3d, 1875 (18 Stat. 470).	AN ACT TO AMEND THE ACT OF CONGRESS, APPROVED MARCH THIRD, EIGHTEEN HUNDRED AND SEVENTY-FIVE, ENTITLED "AN ACT TO DETERMINE THE JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES, AND TO REGULATE THE REMOVAL OF CAUSES FROM STATE COURTS, AND FOR OTHER PURPOSES," AND TO FURTHER REGULATE THE JURISDICTION OF CIRCUIT COURTS OF THE UNITED STATES, AND FOR OTHER PURPOSES.— Approved March 3d, 1887 (24 Stat. 552).
Be it enacted by the Senate and House of Representatives of the	*Be it enacted by the Senate and House of Representatives of the*

(1875.)

United States of America in Congress assembled,

That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of *five hundred* dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a *controversy* between citizens of different States;

or a *controversy* between citizens of the same State claiming lands under grants of different States, or a *controversy* between citizens of a State and foreign States, citizens, or subjects;

(1887.)

United States of America in Congress assembled, That the first section of an Act entitled "An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," approved March third, eighteen hundred and seventy-five, be, and the same is hereby, amended so as to read as follows: —

"That the Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of *interest and* costs, the sum or value of *two thousand* dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which *controversary* the United States are plaintiffs or petitioners, or in which there shall be a *controversary* between citizens of different States, *in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid,*

or a *controversary* between citizens of the same State, claiming lands under grants of different States, or a *controversary* between citizens of a State and foreign States, citizens, or subjects, *in which the matter in dis-*

(1875.)

and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable *therein*. But no person shall be arrested in one District for trial in another in any civil action before a Circuit or District Court. And no civil suit shall be brought before either of said courts against any person by any original process *or* proceeding in any other District than that whereof he is an inhabitant, *or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided;*

nor shall any Circuit or District court have cognizance of any suit *founded on contract* in favor of *an* assignee, unless *a* suit might have been prosecuted in such court to recover *thereon* if no assignment had been made, *except in cases of promissory notes negotiable by the law merchant and bills of exchange.*

(1887.)

pute exceeds, exclusive of interest and costs, the sum or value aforesaid,

and shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the District Courts of the crimes and offences cognizable *by them*. But no person shall be arrested in one District for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process *of* proceeding in any other District than that whereof he is an inhabitant; *but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the District of the residence of either the plaintiff or the defendant;*

nor shall any Circuit or District Court have cognizance of any suit *except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action* in favor of *any* assignee, *or of any subsequent holder* [*of*] *such instrument be payable to bearer and be not made by any corporation,* unless *such* suit might have been prosecuted in such court to recover *the said contents* if no assignment *or transfer* had been made;

(1875.)

And the Circuit Courts shall also have appellate jurisdiction from the District Courts under the regulations and restrictions prescribed by law.

Section 2. (Clause 1.) That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any State court *where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority,*

or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different States, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens, or subjects, either party may remove said suit into the Circuit Court of the United States for the proper District.

(Clause 2.)

And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different

(1887.)

and the Circuit Courts shall also have appellate jurisdiction from the District Courts, under the regulations and restrictions prescribed by law."

"Section 2. (Clause 1.) That any suit of a civil nature, at law or in equity, *arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the Circuit Courts of the United States are given original jurisdiction by the preceding section, which may* now *be* pending, or *which may* hereafter *be* brought, in any State court, *may be removed by the defendant or defendants therein to* the Circuit Court of the United States for the proper District;

(Clause 2.)

any other suit of a civil nature, at law or in equity, of which the Circuit Courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any State court, may be removed into the Circuit Court of the United States for the proper District by the defendant or defendants therein being non-residents of that State;

(Clause 3.)

and when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different

(1875.)

States, and which can be fully determined as between them, then either one or more of the *plaintiffs or* defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper District.

[Section 639 of the Rev. Stats. reads as follows: —

"Any suit commenced in any State court wherein the amount in dispute, exclusive of costs, exceeds the sum or value of $500, to be made to appear to the satisfaction of said court, may be removed, for trial, into the Circuit Court, for the District where such suit is pending, next to be held after the filing of the petition for such removal hereinafter mentioned, in the cases and in the manner stated in this section. . . .

"Third. When a suit is between a citizen of the State in which it is brought and a citizen of another State, it may be so removed on the petition of the latter, whether he be plaintiff or defendant, filed at any time before the trial or final hearing of the suit, if, before or at the time of filing said petition, he makes and files in said State court an affidavit, stating that he has reason to believe and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court."

(1887.)

States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper District.

(Clause 4.)

"*And where a suit is now pending, or may be hereafter brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the Circuit Court of the United States for the proper District, at any time before the trial thereof, when it shall be made to appear to said Circuit Court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause; Provided, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said Circuit Court may direct the suit to be remanded, so*

(1875.)

The remaining portion of section 639, Rev. Stats., requires the giving of a bond in the State court at the time of filing the petition for removal, conditioned to enter a copy of the record in the Circuit Court on the first day of its session, etc. It also states the effect of the removal on the suit.]

[The last paragraph of section 5 of Act of March 3, 1875, reads as follows: —

"But the order of said Circuit Court, dismissing or remanding said cause to the State court, shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

This paragraph is repealed by section 6 of Act of March 3, 1887.]

(1887.)

far as relates to such other defendants, to the State court, to be proceeded with therein.

(Clause 5.)

"*At any time before the trial of any suit which is now pending in any Circuit Court or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the Circuit Court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such State court, it shall cause the same to be remanded thereto.*

(Clause 6.)

"*Whenever any cause shall be removed from any State court into any Circuit Court of the United States, and the Circuit Court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the Circuit Court so remanding such cause shall be allowed.*"

(1875.)

SEC. 3. That whenever *either* party, *or any one or more of the plaintiffs or defendants* entitled to remove any suit mentioned in the next preceding section,

shall desire to remove such suit from a State court to the Circuit Court of the United States, he *or they* may make and file a petition in such suit in such State court *before or at the term at which said cause could be first tried and before the trial thereof*,

for the removal of such suit into the Circuit Court to be held in the District where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for *there* appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the State court to accept said petition and bond, and pro-

(1887.)

That section 3 of said Act be, and the same is hereby, amended so as to read as follows: —

"SEC. 3. That whenever *any* party entitled to remove any suit mentioned in the next preceding section, *except in such cases as are provided for in the last clause of said section*,

may desire to remove such suit from a State court to the Circuit Court of the United States, he may make and file a petition in such suit in such State court *at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff*, for the removal of such suit into the Circuit Court to be held in the District where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such Circuit Court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said Circuit Court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for *their* appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond,

(1875.)

ceed no further in such suit, *and any bail that may have been originally taken shall be discharged;* and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of *five hundred* dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his *power* or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim

(1887.)

and proceed no further in such suit;

and the said copy being entered as aforesaid in said Circuit Court of the United States, the cause shall then proceed in the same manner, as if it had been originally commenced in the said Circuit Court; and if in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State, and the matter in dispute exceed the sum or value of *two thousand* dollars, exclusive of *interest and* costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim

(1875.)

under such grant, any one or more of the party moving for such information may then, on petition and bond as hereinbefore mentioned in this Act, remove the cause for trial to the Circuit Court of the United States next to be holden in such District; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim, *and the trial of issues of fact in the Circuit Courts shall, in all suits except those of equity and admiralty and maritime jurisdiction, be by jury.*

The following are the further provisions of the Act of March 3, 1875.

SEC. 4. That when any suit shall be removed from a State court to a Circuit Court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced. And all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual,

(1887.)

under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this Act, remove the cause for trial to the Circuit Court of the United States next to be holden in such District; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim."

The following are the further provisions of the Act of March 3, 1887.

SEC. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof be punished by a fine not exceeding

(1875.)

notwithstanding said removal. And all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

SEC. 5. That if, in any suit commenced in a Circuit Court, or removed from a State court to a Circuit Court of the United States, it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaiutiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no farther therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

But the order of said Circuit Court dismissing or remanding said cause to the State court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be.

SEC. 6. That the Circuit Court of the United States shall, in all

(1887.)

$3,000, or by imprisoument not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

SEC. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively located; and in such cases the Circuit and District Courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer

(1875.)

suits removed under the provisions of this Act, proceed therein as if the suit had been originally commenced in said Circuit Court, and the same proceedings had been taken in such suit in said Circuit Court as shall have been had therein in said State court prior to its removal.

SEC. 7. That in all causes removable under this Act, if the term of the Circuit Court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the State court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said Circuit Court, and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf; that if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same a copy of the record therein, after tender of legal fees for such copy said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the Circuit Court of the United States to which said action or proceeding was removed, shall be punished by imprisonment not more

(1887.)

thereof, or cases for winding up the affairs of any such bank.

SEC. 5. That nothing in this Act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in section 641, or in 642, or in 643, or in 722, or in Title XXIV. of the Revised Statutes of the United States, or mentioned in section 8 of the Act of Congress of which this Act is an amendment, or in the Act of Congress approved March 1, 1875, entitled "An Act to protect all citizens in their civil or legal rights."

SEC. 6. That the last paragraph of section 5 of the Act of Congress, approved March 3, 1875, entitled "An Act to determine the jurisdiction of Circuit Courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and section 640 of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this Act, be, and the same are hereby, repealed: *Provided*, That this Act shall not affect the jurisdiction over or disposition of any suit removed from the court of any State, or suit commenced in any court of the United States, before the passage hereof, except as otherwise expressly provided in this Act.

SEC. 7. That no person related to any justice or judge of any

(1875.)

than one year, or by fine not exceeding one thousand dollars, or both in the discretion of the court.

And the Circuit Court to which any cause shall be removable under this Act shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this Act for the removal of the same, and enforce said writ according to law; and if it shall be impossible for the parties or persons removing any cause under this Act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the Circuit Court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said Circuit Court shall require the other party to plead, and

(1887.)

court of the United States by affinity or consanguinity, within the degree of first-cousin, shall hereafter be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member.

Approved, March 3, 1887.

(1875.)

said action or proceeding shall proceed to final judgment; and the said Circuit Court may make an order requiring the parties thereto to plead *de novo;* and the bond given, conditioned as aforesaid, shall be discharged so far as it requires a copy of the record to be filed as aforesaid.

SEC. 8. That when in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the District where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said District, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent

(1875.)

defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said District; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such District. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another District, but within the same State, said suit may be brought in either District in said State; *Provided, however*, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said Circuit Court, and thereupon the said court shall make an order setting aside the judgment therein,

(1875.)

and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

SEC. 9. That whenever either party to a final judgment or decree which has been or shall be rendered in any Circuit Court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such Circuit Court a duly certified copy of his appointment, and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the Supreme Court, as provided in case of the death of a party after appeal taken or writ of error brought.

SEC. 10. That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

Approved, March 3, 1875.

APPENDIX B.

FORM No. 1.

PETITION FOR REMOVAL IN CRIMINAL CASES UNDER SECTION 643, REVISED STATUTES.

The State of } Indictment, charge murder.
vs. } In the Court of the State
—— ——. } of .

To the Circuit Court of the United States for the District of .

Your petitioner, defendant in the above stated cause, respectfully represents:

That on the day of , 18 , at the term of said State court, at the instance of as prosecutor, your petitioner was indicted for wilfully, unlawfully, and of malice aforethought killing one , which indictment and criminal prosecution is still pending against petitioner in said court.

Your petitioner further represents, that no murder was committed by the killing aforesaid, but in fact the killing was committed, if committed by your petitioner at all, in the necessary self-defence of your petitioner; that at the time the alleged offence was committed, if committed at all, your petitioner was an officer of the United States, to wit, a *deputy collector* of *internal revenue*, and the Act for which he was indicted was done, if done at all, while en-

gaged in the discharge of the duties of his office as said deputy collector; that he was at the time acting by and under the authority of the internal revenue laws of the United States, and under and by right of his office as deputy collector of internal revenue of the United States; that it became, and was, his duty under said revenue laws to seize illicit distilleries and the apparatus that was used for the illicit and unlawful distillation of spirits, and while so attempting to enforce said revenue laws, as deputy collector aforesaid, he was assaulted and resisted, and fired upon by a number of armed men, and in defence of his life returned fire, and then and there used no more force than was necessary to protect his own life, which is the act for which he was indicted.

Your petitioner therefore prays that said cause may be removed from the Court of County, in the State of , to the Circuit Court of the United States for the District of , and inasmuch as said suit has been commenced in said State court by indictment and capias, and your petitioner is in actual custody (of the sheriff of said county) on mesne process therein, your petitioner prays that a writ of habeas corpus cum causa to the clerk or other custodian of the record of the said State court may issue, and that the marshal take the body of the defendant, your petitioner, into his custody, to be dealt with according to the statute in such case made and provided.

——— ———,
Attorney for Petitioner.

AFFIDAVIT.

United States of America. }
District of }

I, , being duly sworn, depose and say that I am the petitioner named in the foregoing petition, that I have read

the same, and that the matters and things therein contained are true of my own knowledge.

——— ———,
Petitioner.

Sworn to, and subscribed, before me this day of 18 .

——— ———,
United States Circuit Court Commissioner for said District.
[Or other authorized officer.]

CERTIFICATE OF COUNSEL.

I, , being an attorney at law of the Supreme Court of the State of [or other court of record of the State or of the United States], the same being a court of record, do hereby certify that, as counsel for the petitioner in the foregoing petition named, I have examined the proceedings against him mentioned therein, and carefully inquired into the matters therein set forth, and that I believe them to be true.

——— ———,
Attorney for the Petitioner.

ORDER ALLOWING.

The foregoing petition is allowed. Let the writ of habeas corpus cum causa issue.

Dated at
this day of , 18 .

——— ———,
U. S. Judge.

NOTE. — For necessity of having the writ allowed by the judge, see *Ex parte* Wells, 3 Woods, 132. But in vacation the clerk may issue. Salem & Lowell R. R. Co. *v.* Boston & Lowell R. R. Co., 21 Law Rep. 210.

FORM No. 2.

WRIT OF HABEAS CORPUS CUM CAUSA.

The President of the United States of America to the Court of the State of in the judicial District, and to the clerk and other officers thereof, and to the (sheriff) of said county.

Greeting:

Being informed that there is now pending in the Court of the State of a criminal prosecution commenced in said court on the part of the State of against one for and on account of acts done by him under the internal revenue laws of the United States. For that on the day of 18 , at the term of said court, at the instance of , prosecutor, the said was indicted for wilfully, unlawfully, and of malice aforethought killing one , which indictment is still pending. And being further informed that at the time the alleged offence was committed, if committed at all, the said was an officer of the United States, to wit, a deputy collector of internal revenue, and that he was at the time acting under color of his said office, and that said prosecution has been commenced in said State court by indictment and capias, and that said is in the actual custody (of the sheriff of said county) on mesne process therein; and we being willing for certain reasons that the said prosecution and the records and proceedings should be certified by the said court, and removed into our Circuit Court of the United States in and for the District of , do hereby command you, that you deliver into the custody of the Marshal of the United States for the District of the body of the said defendant to be dealt with in the cause according to law, and that you send without

delay to the said Circuit Court a copy of the record and proceedings in said prosecution, or otherwise show the cause of the taking and detaining of the said , so that the said Circuit Court may act thereon as of right and according to law ought to be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at , the day of , A. D. 18 .

SEAL.

—— ——,
Clerk.

—— ——, *Attorney for Petitioner.*

FORM No. 3.

CERTIORARI UNDER SECTION 643, REVISED STATUTES.

The President of the United States of America to the Court of the State of in the judicial District,

Greeting:

Being informed that there is now pending before you a suit in which is plaintiff and defendant, which suit was commenced in said court against the said for and on account of acts done by him under the revenue laws of the United States; that said suit was commenced by summons and complaint, and that said suit has not been tried, and we being willing for certain reasons that the said cause and the records and proceedings therein should be certified by the said court, and removed into our Circuit Court of the United States in and for the District of , do hereby command you that you send without delay to the said Circuit Court, as aforesaid, the record and proceedings in said cause, so that the said Circuit Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at , the day of , A. D. 18 .

SEAL.

—— ——,
Clerk.

—— ——, *Attorney for Plaintiff in error.*

FORM No. 4.

PETITION FOR REMOVAL UNDER SUBSECTION 3 OF SECTION 639, R. S. — PREJUDICE ACT OF 1867.[1]

In the Court of County, State of .

A. B. *vs.* C. D. } Petition to remove this cause to the United States Circuit Court.

To the Honorable the Court of County, State of .

Your petitioner, , respectfully shows that he is plaintiff [or defendant] in the above entitled suit, and that the same was commenced on or about the day of , 18 , in said court; that your petitioner was at the time of bringing said suit, and still is, a citizen of the State of . Your petitioner further shows that there is, and was at the time said suit was brought, a controversy therein between your petitioner and the said defendant [or plaintiff, as case may be], who was at the time of the bringing said suit, and still is, a citizen of the State of ; that said action was brought for the purpose of [here state the nature of the suit and the relief asked], and that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs.

[1] See *ante*, §§ 42, 43.

Your petitioner further states that the suit is now pending for trial in the Court of the State of for said county of , and that he desires to remove the same into the Circuit Court of the United States for the District of , in pursuance of the statute in that behalf provided; to wit, subsection 3 of section 639 Revised Statutes of the United States.

Your petitioner further says that he has filed herewith the affidavit required by the statute in such cases, and offers here good and sufficient surety, to wit, his bond executed by of as principal, and as surety, in the penal sum of two hundred and fifty dollars [or other sum to be fixed by the State court], as required by said statutes on the removal of a cause.

Your petitioner therefore prays that the said bond may be accepted as good and sufficient, and that the said suit may be removed into the next Circuit Court of the United States in and for said District of , pursuant to the statute aforesaid, and that no further proceedings may be had therein in this court. —— ——,

Attorney for Plaintiff [*or Defendant*].

FORM No. 5.

AFFIDAVIT OF PREJUDICE OR LOCAL INFLUENCE UNDER SUBSECTION 3 OF SECTION 639, REVISED STATUTES.

In the Court, County, State of .

A. B., plaintiffs,
vs.
C. D., defendants.
} Affidavit of prejudice.

State of , County of , SS.

I, , being duly sworn, do say that I am in the above entitled cause; that I have reason to believe, and do

believe, that from prejudice and local influence I will not be able to obtain justice in said State court.

A. B.

Sworn to and subscribed before me at this day of , 18 .

—— ——,
Notary Public in and for said County of .

NOTE. — As to who may make this affidavit, see *ante*, § 17.

FORM No. 6.

BOND FOR REMOVAL UNDER SECTION 639, REVISED STATUTES.

In the Court of County, State of

A. B. *vs.* C. D. } Bond for transfer of this cause to the United States Circuit Court.

Know all men by these presents, — That , as principal, and of , as surety, are held and firmly bound unto [the opposite party in the suit], and all other persons whom it may concern, in the penal sum of two hundred and fifty dollars [or other sum to be fixed by the State court], for the payment of which, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

The condition of this obligation is such that if shall enter and file in the next session of the Circuit Court of the United States in and for the District of , on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in a certain suit or action now pending in the Court of the County of

and State of in which is plaintiff and defendant, and shall do such other appropriate acts as, by the statutes of the United States, are required in that behalf, upon the removal of a suit from a State court into the said United States court, then this obligation to be void, otherwise of force.

Witness our hands and seals this day of , 18 .

A. B., *Principal, by*

L. Q., *his Attorney.* SEAL.

E. F., *Surety.* SEAL.

JUSTIFICATION.

State of , }
County. }

I, , of said county, the surety named in the foregoing bond, being duly sworn, depose and say that I am a resident of the State of and a property holder therein; that I am worth the sum of dollars over and above all my debts and liabilities, and exclusive of property by law exempt from execution, that I have property in the said State, liable to execution of the value of more than hundred dollars.

E. F.

Sworn to and subscribed before me this day of 18 .

——— ———,

Clerk [of the State court, or other officer authorized to administer oaths].

FORM No. 7.

PETITION FOR REMOVAL UNDER CLAUSE 1 OF SECTION 2 OF ACT OF MARCH 3, 1887, WHERE A FEDERAL QUESTION IS THE GROUND OF REMOVAL.

In the Court of County, State of .

A. B., plaintiff, *vs.* C. D., defendant. } Petition to remove this cause to the United States Circuit Court.

To the Honorable the Court of County, State of .

Your petitioner, , respectfully shows that he is defendant in the above entitled suit, that the matter in dispute therein exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That said suit is of a civil nature [here state the nature of the suit and the relief asked].

That said suit is one arising under the laws of the United States, in this, to wit: [here state the facts which show the Federal character of the case; see *ante*, § 20].

That the said defendant, your petitioner, was, at the time of the commencement of this suit, and still is, a non-resident of the State of .

Your petitioner offers herewith a bond with good and sufficient surety for his entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And he prays this court to proceed no further herein, except to make an order of removal, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the District of .

C. D., *by* L. Q., *his Attorney.*

If verified, see *ante*, § 33, it may be in the following form: —

State of , } ss.
County, }

I, L. Q., being duly sworn, do say that I am a member of the firm of , the attorneys for the petitioner in the above entitled cause; that I have read the foregoing petition, and know the contents thereof; and that the statements and allegations therein contained are true, as I verily believe.

L. Q.

Sworn to and subscribed before me this day of 18

——— ———,

Clerk [of the State court, or other officer authorized to administer oaths.]

FORM No. 8.

PETITION FOR REMOVAL UNDER CLAUSE 3 OF SECTION 2 OF ACT OF MARCH 3, 1887, WHERE THERE IS A CONTROVERSY WHICH IS WHOLLY BETWEEN CITIZENS OF DIFFERENT STATES.

In the Court of County, State of .

A. B., plaintiff,
vs.
C. D. et al., defendants. } Petition to remove this cause to the United States Circuit Court.

To the Honorable the Court of County, State of .

Your petitioner, C. D., respectfully shows that he is one of the defendants [or the defendant, as the case may be] in the above entitled suit, that the matter in dispute therein

exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That said suit is of a civil nature [here state the nature of the suit and the relief asked, and make the statement sufficiently explicit to negative the exception of suits in favor of assignees and subsequent holders of choses in action] See *ante*, § 27.

Your petitioner further states that, in the said above mentioned suit, there is a controversy which is wholly between citizens of different States, and which can be fully determined as between them, to wit, a controversy between your said petitioner, who avers that he was, at the commencement of this suit, and still is, a citizen of the State of , and the said A. B., who, your petitioner avers, was, at the commencement of this suit, and still is, a citizen of the State of , and that both the said A. B. and your said petitioner are actually interested in said controversy.

And your petitioner offers herewith a bond with good and sufficient surety for his entering in said Circuit Court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And he prays this court to proceed no further herein, except to make an order of removal, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the District of .

C. D., *by* L. Q., *his Attorney.*

[If verified, the verification may be in the same form as that under Form 7.]

NOTE. — If a removal is sought under clause 2 of section 2 of the Act of 1887, it will also be necessary to state that the petitioner

is a non-resident of the State in which the suit was brought. In other respects, the above form will answer for causes removed on account of citizenship under clause 2, as well as under clause 3. As to whether clause 3 does not cover suits containing but a single controversy, see *ante*, § 29 *et seq.*

FORM No. 9.

BOND FOR REMOVAL OF A CAUSE UNDER CLAUSES 1, 2, AND 3 OF SECTION 2 OF ACT OF MARCH 3, 1887.

In the Court of County, State of .

A. B. *vs.* C. D. } Bond for transfer of this cause to the United States Circuit Court.

Know all men by these presents, that I, as principal, and , as surety, are held and firmly bound unto [the opposite party in the suit], and all other persons whom it may concern, in the penal sum of two hundred and fifty dollars [or other sum to be fixed by the State court], for the payment of which, well and truly to be made, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet, upon these conditions: The said having petitioned the Court of County, State of , for the removal of a certain cause therein pending, wherein is plaintiff and is defendant, to the Circuit Court of the United States in and for the District of .

Now, if the said , your petitioner, shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said Court shall

hold that said suit was wrongfully or improperly removed thereto, [if special bail was originally requisite in said cause, then add "and shall then and there appear and enter special bail in said suit,"] then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals, this day of A. D. 18 .

C. D., *Principal, by*

L. Q., *his Attorney.* SEAL.

E. F., *Surety.* SEAL.

[A Justification is not necessary, unless required by the State court to satisfy it of the sufficiency of the surety. For form of Justification, see that given at the end of Form No. 6, *supra.*]

NOTE. — Formalities of the bond. A case was remanded by Judge Gresham, because the penal sum in the bond was left blank. Burdick *v.* Hale, 7 Biss. 96. But a new bond may be allowed as a substitute in the Circuit Court by way of amendment. Harris *v.* Railroad, 18 Fed. Rep. 833. An obligation expressed in the form usual for a bond, but without a seal, is not a bond within the meaning of a statute requiring the execution of a bond; though it may be a valid contract at common law. United States *v.* Linn, 15 Peters, 290. Under the laws of Georgia, when a bond is required by law, an undertaking in writing without seal is sufficient, and in other cases except official seals, a scrawl intended as a seal shall be held as such. Georgia Code, sections 4 and 5. A bond with a scrawl seal is valid as a compliance with an Act of Congress requiring a bond. United States *v.* Stephenson, 1 McLean C. C. 462. The formalities of the bond are matters for the State court to pass upon, and may be waived. *Ante*, § 34. In the Removal Cases, although the instrument was not under seal, no point seems to have been made upon it in the State court. Removal Cases, 100 U. S. 457. It is for the State court to say whether it shall require the surety to justify, or the signatures to the bond to be acknowledged before some officer of the State authorized to take acknowledgments. *Ante*, § 34.

FORM No. 10.

PETITION FOR REMOVAL UNDER CLAUSE 4 OF SECTION 2 OF ACT OF MARCH 3, 1887.—LOCAL INFLUENCE OR PREJUDICE.

In the Circuit Court of the United States for the District of .

A. B., plaintiff,
vs.
C. D. et al., defendants.

Petition to remove cause so entitled from State court.

To the Honorable the judges of the Circuit Court of the United States for the District of Georgia.

Your petitioner, C. D., respectfully shows that he is one of the defendants [or the defendant, as the case may be] in the above entitled suit, which has not been tried, but is now pending for trial in the Court of the State of for the County of , and that he desires to remove the same into the Circuit Court of the United States for the District of .

Your petitioner further states that in the said above mentioned suit there is a controversy between a citizen of the State in which the said suit is brought and a citizen of another State, to wit, a controversy between your said petitioner, who avers that he was, at the commencement of the said suit, and still is, a citizen of the State of , and the said A. B., who, your petitioner avers, was, at the commencement of the said suit, and still is, a citizen of the State of , in which State said suit was brought. And that both the said A. B. and your petitioner are actually interested in said controversy.

Your petitioner further states that he has filed herewith an affidavit, that it may be made to appear to the said Circuit Court that from prejudice and local influence your

petitioner will not be able to obtain justice in the said State court, or in any other State court to which your petitioner may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause.

That said suit was brought for the purpose of [here state the nature of the suit and the relief asked].

Your petitioner therefore prays that the said affidavit may be accepted as good and sufficient, and that the said suit may be removed into the said Circuit Court of the United States for the District of aforesaid. And to the end also that the said removal may be perfected, that such order be made in the premises as the nature of the case may require.

[A special prayer may be added for writ of habeas corpus or certiorari, as the nature of the suit may require.]

——— ———,

Attorney for Defendant.

VERIFICATION.

United States of America, }
District of } ss.

I, L. Q., being duly sworn, do say that I am a member of the firm of , the attorneys for the petitioner in the above entitled cause; that I have read the foregoing petition, and know the contents thereof; and that the statements and allegations therein contained are true, as I verily believe.

L. Q.

Sworn to and subscribed before me this day of , 18 .

——— ———,

Clerk of U. S. Court [or U. S. Commissioner, or other officer authorized to administer oaths].

FORM No. 11.

AFFIDAVIT OF PREJUDICE OR LOCAL INFLUENCE TO ACCOMPANY THE FOREGOING PETITION.

In the Circuit Court of the United States for the District of .

A. B., plaintiff,
vs.
C. D. et al., defendants.

Cause pending in State court.
Affidavit to remove.

VERIFICATION.

United States of America, District of } ss.

I, C. D., being duly sworn, do say that I am the defendant [or one of the defendants, as the case may be] in the above entitled cause; that I have reason to believe, and do believe, that from prejudice and local influence I will not be able to obtain justice in the Court of the State of and County of , or in any other State court to which the said defendant, your petitioner, may, under the laws of the said State, have the right, on account of such prejudice or local influence, to remove said cause.

C. D.

Sworn to and subscribed before me at , this day of , 18 .

——— ———,

U. S. Commissioner [or other officer authorized to administer oaths].

NOTE. — As to who may make this affidavit, see *ante*, § 17, and § 37.

As a matter of practice, it will be advisable, where it can be done, to present a copy of the record from the State court to the Circuit Court at the time of petitioning for the removal.

FORM No. 12.

WRIT OF CERTIORARI UNDER SECTION 7 OF THE ACT OF MARCH 3, 1875.

The President of the United States of America to the Judge of the Court of County, State of .

Whereas it has been represented to the Circuit Court of the United States for the District of that a certain suit was commenced in the Court of County, State of , wherein , a citizen of the State of , was plaintiff, and , a citizen of the State of , was defendant, and that the said duly filed in the said State court his petition for the removal of said cause into the said Circuit Court of the United States, and filed with said petition the bond with surety required by the Act of Congress of March 3, 1875, entitled, "An Act to determine the jurisdiction of the Circuit Courts of the United States, and to regulate the removal of causes from State courts, and for other purposes," and by the Act of Congress of March 3, 1887, amendatory of said Act, and that the clerk of the said State court above named has refused to the said petitioner for the removal of said cause a copy of the record therein, though his legal fees therefor were tendered by the said petitioner:

You therefore are hereby commanded that you forthwith certify, or cause to be certified, to the said Circuit Court of the United States for the District of , a full, true, and complete copy of the record and proceedings in the said cause, in which the said petition for removal was filed as aforesaid, plainly and distinctly, and in as full and ample a manner as the same now remain before you, together with this writ; so that the said Circuit Court may

be able to proceed thereon and do what to them shall appear of right ought to be done. Herein fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of the said Circuit Court hereto affixed, this the day of , A. D. 18 .

SEAL.

____ ____,
Clerk of said Circuit Court.

The clerk of the State court may make return to the writ.

APPENDIX C.

ESSENTIAL ELEMENTS OF UNITED STATES CIRCUIT COURT JURISDICTION UNDER T

Essential elements in one or more of the cases in which removal is allowed.	Act of March 2, 1867.	Act of March 3, 1875.						
	Sub-div. 3 of § 639, R. S. Prejudice.	Clause 1 of § 2. Subject Matter.	Clause 1 of § 2. United States Plaintiff.	Clause 1 of § 2. Aliens.	Clause 1 of § 2. Citizenship.	Clause 2 of § 2. Citizenship.	Clause 1 of § 2. Subject Matter.	Clause Land
Who may remove.	Either plaintiff or defendant, provided he be a citizen of another State, and the opposite party be a citizen of the State where suit is brought. If more than one, then all the parties on one side must be citizens of such other State or States, while all on the other side must be citizens of the State where suit is brought. (1)	Either party plaintiff or defendant.	Either party plaintiff or defendant.	Either party plaintiff or defendant, provided the controversy be between citizens of a State and foreign States, citizens, or subjects. If more than one, then all the parties arranged according to the merits of the controversy on the one side must be citizens of a State, and all on the other must be foreign States, citizens, or subjects.	Either party plaintiff or defendant, provided it be a controversy between citizens of different States. If more than one, then all the parties arranged according to the merits of the controversy on the one side must be of different citizenship from all the parties on the other side. (6)	Either one or more of the plaintiffs or defendants actually interested may remove the whole suit, provided the controversy as between him and the other party opposed to him is wholly between citizens of different States, and provided the other parties are not indispensable parties to the controversy between him and his opponent. The other parties must be nominal, or the cause capable of being split in two. (8)	The defendant or defendants only.	The defend ants bei dents of
Plaintiff's citizenship must be.			The United States must be plaintiff or petitioner.					The citize plaintiff a must be State.
Defendant's citizenship must be.								The plainti ant must zens of th
Defendant's residence must be.								The defend a non-re State wh brought.
Must the whole suit be removed?	The whole suit must be removed. (1)	The whole suit must be removed. (6)	The whole suit must be removed. (6)	The whole suit must be removed. (6)	The whole suit must be removed. (6)	The whole suit must be removed. (8)	The whole suit must be removed. (10)	The whole removed.
Must all parties on the same side unite in exercising the right?	All the parties on the same side must unite. But not nominal parties. (2)	All the parties on the same side must unite. But not nominal parties. (6)	All the parties on the same side must unite. But not nominal parties. (6)	All the parties on the same side must unite. But not nominal parties. (6)	All the parties on the same side must unite. But not nominal parties. (6)	All the parties on the same side need not unite. (8)	All the parties on the same side must unite. But not nominal parties. (10)	All the pa same side But not ties.
What must be the subject matter.	Suit must be monetary in character. (3)	Monetary suit arising under the Constitution, laws, or treaties of United States, or a controversy between citizens of the same State claiming lands under grants of different States. (3)	Suit must be monetary in character. (3)	Suit must be monetary in character. (3)	Suit must be monetary in character. (3)	Suit must be monetary in character. (3)	Monetary suit arising under the Constitution, laws, or treaties of United States.	Monetary s there is between same St lands un different
The sum or value must exceed.	Exclusive of costs, $500.	Exclusive of costs, $500.	Exclusive of costs, $500.	Exclusive of costs, $500.	Exclusive of costs, $500.	Exclusive of costs, $500.	Exclusive of interest and costs, $2000.	Exclusive o costs, $2
What must be the grounds of removal.	Belief in the existence of prejudice or local influence in the particular State court.	The subject matter.	Because the United States is plaintiff or petitioner.	Because the suit is between a citizen and an alien.	Citizenship.	Citizenship.	The subject matter Federal question.	The subject for lands grants States.
Does the limitation in regard to suits in favor of assignees of choses in action apply.	No. (4)	No.	No.	No. (4)	No. (4)	No. (4)	No.	
In what court must the proceeding to remove be instituted.	State court.	State court.	State court.	State court.	State court.	State court.	State court.	State
When must the proceeding to remove be instituted.	Before the trial or final hearing, (5)	Before or at the term at which said cause could be first tried, and before the trial, (7)	Before or at the term at which the cause could be first tried, and before the trial, (7)	Before or at the term at which the cause could be first tried, and before the trial, (7)	Before or at the term at which the cause could be first tried, and before the trial, (7)	Before or at the term at which the cause could be first tried, and before the trial, (7)	At or before the time when he is required by the laws of the State to plead or answer,	At or bef when he the laws plead or
Is bond given?	bond is given to enter copy of pleadings, and for appearance in Circuit Court.	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	bond is gi copy of pay costs removed appearan Court.

(1) 18 Wall. 553; 103 U. S. 210; 107 U. S. 546; 117 U. S. 272; 118 U. S. 54; 119 U. S. 586.
(2) 8 Blatchf. 73; 49 How. (Pr.) Rep. 115; 116 U. S. 408.
(3) 115 U. S. 487. *Ante*, § 35.
(4) 110 U. S. 81.
(5) May be removed after new trial granted, but not while motion for new trial is pending. 19 Wall. 214; 21 Wall. 41.
(6) 100 U. S. 457; 103 U. S. 205.
(7) Before or at the term when the cause would stand for trial, and before hearing on demurrer. 103 U. S. 606; 1 U. S. 711; 113 U. S. 87; 113 U. S. 742.
(8) 103 U. S. 205.

APPENDIX C.

[C]UIT COURT JURISDICTION UNDER THE REMOVAL ACTS OF 1867, 1875, AND 1887.

		Act of March 3, 1887.						
	Clause 2 of § 2. Citizenship.	Clause 1 of § 2. Subject Matter.	Clause 2 of § 2. Land grants.	Clause 2 of § 2. United States Plaintiff.	Clause 2 of § 2. Aliens.	Clause 2 of § 2. Citizenship.	Clause 3 of § 2. Citizenship.	Clause 4 of § 2. Prejudice.
or . it be- er- ien ged its on be hip on (6)	Either one or more of the plaintiffs or defendants actually interested may remove the whole suit, provided the controversy as between him and the other party opposed to him is wholly between citizens of different States, and provided the other parties are not indispensable parties to the controversy between him and his opponent. The other parties must be nominal, or the cause capable of being split in two. (8)	The defendant or defendants only.	The defendant or defendants being non-residents of the State.	The defendant or defendants being non-residents of the State.	The defendant or defendants being non-residents of the State, provided the controversy be between citizens of a State and foreign States, citizens, or subjects. If more than one, then all the parties arranged according to the merits of the controversy on the one side must be citizens of a State, and all on the other must be foreign States, citizens, or subjects, and all the defendants must be non-residents. (10)	The defendant or defendants being non-residents of the State, provided the controversy be between citizens of different States. If more than one, then all the parties arranged according to the merits of the controversy on the one side must be of different citizenship from all the parties on the other side, and all the defendants must be non-residents. (10)	Either one or more of the plaintiffs or defendants actually interested may remove the whole suit, provided the controversy as between him and the other party opposed to him is wholly between citizens of different States, and provided the other parties are not indispensable parties to the controversy between him and his opponent. The other parties must be nominal, or the cause capable of being split in two. (11)	Any defendant being such citizen of another State.
			The citizenship of the plaintiff and defendant must be of the same State.	The United States must be plaintiff or petitioner.				The plaintiff must be a citizen of the State where suit is brought.
			The plaintiff and defendant must both be citizens of the same State.					The defendant must be a citizen of another State.
			The defendant must be a non-resident of the State where suit is brought.	The defendant must be a non-resident of the State where suit is brought.	The defendant must be a non-resident of the State where suit is brought.	The defendant must be a non-resident of the State where suit is brought.		
be (6)	The whole suit must be removed. (8)	The whole suit must be removed. (10)	The whole suit must be removed. (10)	The whole suit must be removed. (10)	The whole suit must be removed. (10)	The whole suit must be removed. (10)	The whole suit must be removed. (11)	The whole suit must be removed, but, if capable of being split in two, the part not affecting him may be remanded.
he te. ar- (6)	All the parties on the same side need not unite. (8)	All the parties on the same side must unite. But not nominal parties. (10)	All the parties on the same side must unite. But not nominal parties. (10)	All the parties on the same side must unite. But not nominal parties. (10)	All the parties on the same side must unite. But not nominal parties. (10)	All the parties on the same side must unite. But not nominal parties. (10)	All the parties on the same side need not unite. (11)	All the parties on the same side need not unite.
ry (3)	Suit must be monetary in character. (3)	Monetary suit arising under the Constitution, laws, or treaties of United States.	Monetary suit in which there is a controversy between citizens of the same State claiming lands under grants of different States.	(9)	Suit must be monetary in character. (3)	Suit must be monetary in character. (3)	Suit must be monetary in character. (3)	Suit need not be of a monetary character. (3)
	Exclusive of costs, $500.	Exclusive of interest and costs, $2000.	Exclusive of interest and costs, $2000.	(9)	Exclusive of interest and costs, $2000.	Exclusive of interest and costs, $2000.	Exclusive of interest and costs, $2000.	No limit.
	Citizenship.	The subject matter Federal question.	The subject matter suits for lands held under grants of different States.	Because the United States is plaintiff or petitioner.	Because the suit is between a citizen and an alien.	Citizenship.	Citizenship.	The existence of prejudice in all the State courts to which access may be had, to be made to appear to Circuit Court.
4)	No. (4)	No.	No.	No.	Yes.	Yes.	Yes.	No.
	State court.	State court.	State court.	State court.	State court.	State court.	State court.	Circuit Court.
at ld e- 7)	Before or at the term at which the cause could be first tried, and before the trial, (7)	At or before the time when he is required by the laws of the State to plead or answer,	At or before the time when he is required by the laws of the State to plead or answer,	At or before the time when he is required by the laws of the State to plead or answer,	At or before the time when he is required by the laws of the State to plead or answer,	At or before the time when he is required by the laws of the State to plead or answer,	At or before the time when he is required by the laws of the State to plead or answer,	At any time before the trial thereof.
er to ly er it	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	bond is given to enter copy of record, and to pay costs if wrongfully removed, and to enter appearance in Circuit Court.	No bond. Copy record brought up by certiorari. (12)

...se would stand for trial, and before hearing on demurrer. 103 U. S. 606; 111 U. S. 472; 112.

(9) Under Section 1 of Act of 1887, jurisdiction is given where United States is plaintiff, irrespective of amount, and therefore under Clause 2 of Section 2.
(10) Clauses 1 and 2 of Section 2 of Act of 1887 are analogous to Clause 1 of Act of 1875, construed in 100 U. S. 457.
(11) Clause 3 of Section 2 of Act of 1887 is in same language as Clause 2 of Act of 1875, construed in 103 U. S. 205.
(12) Section 716, Rev. Stats., and for analogy see Clause 3 of Section 7 of Act of March 3, 1875.

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